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Significance for trusts of land of some key aspects of the trusts of land and Appointment of Trustees Act 1996

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**SIGNIFICANCE FOR TRUSTS OF LAND OF
SOME KEY ASPECTS OF THE TRUSTS OF LAND
AND APPOINTMENT OF TRUSTEES ACT 1996**

BY

SUSAN PASCOE

**THESIS SUBMITTED FOR THE DEGREE OF DOCTOR OF
PHILOSOPHY AT THE UNIVERSITY OF LONDON**

2004

KING'S COLLEGE LONDON

ABSTRACT

The thesis analyses nine key areas of trusts of land within the context of the Trusts of Land and Appointment of Trustees Act 1996. First, it considers whether it was necessary or desirable to prevent the creation of new strict settlements. Second, it questions whether a new unitary system of a trust of land has made trusts for sale unnecessary. Third, it examines whether the doctrine of conversion has been abolished. Fourth, it investigates whether entailed interests can still be created. Fifth, it enquires whether the provisions as to trustees' powers are expedient reforms. Sixth, it evaluates whether the delegation provisions are deficient. Seventh, it discusses whether the right to occupy is an advantageous reform. Eighth, it assesses whether the courts are adopting a new, flexible approach in exercising their powers. Ninth, it debates whether conveyancing efficiency can be improved by redrafting the provisions concerning protection of purchasers. It takes account of surveys of 17 leading firms of solicitors to ascertain on a practical level the views of these solicitors on some provisions of the Act. The underlying theme of the thesis is that the statutory provisions reflect an evaluation of the superior features of strict settlements and trusts for sale rather than an innovative approach taken in initiating and constituting a novel or original trust. The thesis critically considers manifold difficulties and complications in respect of the main sections and demonstrates that the statutory provisions are periodically fragmentary and unmethodical and embody a quagmire of uncertainty and ambiguity. Although many of the problems may be speculative and hypothetical, practical problems remain and the thesis suggests how statutory provisions might be more appropriately drafted.

DECLARATION

I certify that this work is my own.

..Susan..Pascoe.....

Susan Pascoe

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ABBREVIATIONS

The following abbreviated citations are used in the theses. Where references are made to different editions of the same works, these are indicated in the text.

Barracclough and Matthews	Hugh Barracclough and Paul Matthews <i>A Practitioner's Guide to the Trusts of Land and Appointment of Trustees Act 1996</i> (Birmingham: CLT Professional Publishing, 1996)
Cheshire and Burn	<i>Cheshire and Burn's Modern Law of Real Property</i> 16 th edn by E.H. Burn (London: Butterworths, 2000)
Emmet and Farrand on Title	<i>Emmet and Farrand on Title</i> by Julian Farrand and Alison Clarke 19 th edn (looseleaf) (London: Longman Professional, 1986 with updates)
Gray and Gray	Kevin Gray and Susan Francis Gray <i>Elements of Land Law</i> 3 rd edn (London: Butterworths, 2001)
Hanbury and Martin	<i>Hanbury and Martin Modern Equity</i> by Jill E. Martin (London: Sweet and Maxwell, 2001)
Kenny and Kenny	Phillip Kenny and Ann Kenny <i>The Trusts of Land and Appointment of Trustees Act 1996</i> (London: Sweet and Maxwell, 1997)
Lewin on Trusts	<i>Lewin on Trusts</i> 17 th edn by John Mowbray, Lynton Tucker, Nicholas Le Poidevin and Edwin Simpson (London: Sweet and Maxwell, 2000) and First Supplement to the Seventeenth Edition (London: Sweet and Maxwell, 2003)
Megarry and Wade	<i>Megarry and Wade The Law of Real Property</i> 6 th edn by Charles Harpum (London: Sweet and Maxwell, 2000)
Underhill and Hayton	<i>Underhill and Hayton Law Relating to Trusts and Trustees</i> 16 th edn by David J. Hayton (London: Butterworths, 2003)
Whitehouse and Hassall	Chris Whitehouse and Nicholas Hassall <i>Trusts of Land, Trustee Delegation and the Trustee Act 2000</i> 2 nd edn (London: Butterworths, 2001)
Williams on Wills	<i>Williams on Wills</i> 8 th edn by C.H. Sherrin, R.F.D. Barlow, R.A. Wallington, Susannah L. Meadway, Michael Waterworth (London: Butterworths, 2002)

CHAPTER 1- INTRODUCTION

The Trusts of Land and Appointment of Trustees Act 1996, which introduced a new form of landholding by way of the trust of land, brought about very significant changes to the 1925 legislation governing trusts of land. This thesis analyses the following issues: the necessity or desirability of preventing the creation of strict settlements, whether trusts for sale are still necessary, whether the doctrine of conversion has been abolished, whether entailed interests can still be created, problematic provisions governing powers of trustees including powers of delegation, the status of the right to occupy, whether the powers of the court are being exercised in such a way as to represent a departure from the previous law and whether amendments are necessary to the provisions governing protection of purchasers to improve conveyancing efficiency.

The central focus of this thesis is a critique of the provisions of this Act and analysis of the provisions to demonstrate why some are defective. As well as providing an academic review and analysis of Part 1 of the Act, I consulted with some solicitors who had particular experience of settled land to provide practical input.¹ To this end I drafted a questionnaire which can be found in Appendix 1 which I devised to assess the impact of the main provisions of Part 1 of the Trusts of Land and Appointment of Trustees Act 1996 on clients of significant firms of solicitors.

I conducted 17 interviews between April 1999 and January 2000. Only a small number of firms have clients interested under Settled Land Act settlements which can no longer be created after the 1996 Act. It is regrettable that a number of firms refused to be interviewed at all which meant that only 3 solicitors whose firms are situated outside London were interviewed. My survey is not intended to be a statistical survey, but aims to demonstrate a broad range of responses from some leading firms in the field. The objective was that all the possible range of views would emanate from this sample, even though the sample cannot be truly representative. 13 of the interviews were conducted in person at the offices of the solicitor concerned and 4 were

¹ I wrote to Charles Harpum, the Law Commissioner, to arrange an interview with him but he was unwilling to be interviewed.

telephone interviews. I intended that only those interviews (3), which were outside London, would be conducted by telephone but one London firm (Eversheds) also requested a telephone interview. The firms who were interviewed are listed in Appendix 2 with the name and address of the solicitor who was interviewed, his position in the firm and whether it was a personal or telephone interview. The firms are listed according to the date of the interview. Only a small selection of the answers to some of the questions have been used in this thesis since other answers were of peripheral significance only.

There follows a breakdown of the approximate number of relevant clients each firm had in the ten years preceding the date of the interview.

<u>Name of firm</u>	<u>Number of clients solicitor has or had with strict settlements</u>	<u>Number of clients firm has or had with strict settlements</u>
Allen and Overy	2	5-10
Boodle Hatfield	7 or 8	15 or 16
Burges Salmon	3	5-10
Charles Russell	5-10	10-20
Currey and Co	0*	10
Eversheds	1-4	5-10
Farrer and Co	18**	18
Herbert Smith	1-4	1-4
Linklaters and Alliance	2	2
Macfarlanes	3	10-20
May, May and Merrimans	1-4	More than 20
Official Solicitor	4	4
Payne Hicks Beach	2-3	5
Public Trust Office	More than 20	More than 20***
Speechly Bircham	5-10****	2
Wiggin and Co	1	1
Withers	6	Just under 20

* Edward Perks of Currey and Co had no personal experience of strict settlements but his remarks were based on the views of an experienced partner with whom he had discussed the answers.

** Includes own clients and overseeing other solicitors' clients.

*** This is only an estimate comprising approximately 10 intended strict settlements and 40 accidental ones.

**** Includes the number of clients solicitor had in previous firm (Withers) as well.

The original draft of this thesis contained an analysis of every subsection of sections 1 to 16 in great depth.² As this came to almost 200,000 words, only the most important provisions have been selected.

² Sections 1 to 16 are contained in Appendix 3 for ease of reference.

CHAPTER 2- WAS IT NECESSARY OR DESIRABLE TO PREVENT THE CREATION OF NEW STRICT SETTLEMENTS?

A historical overview of strict settlements

The purpose of strict settlements was to preserve land within the traditional landed family through succeeding generations by a settlor (S) granting a life interest to himself, remainder to his eldest son (A) for life and remainder to that son's eldest son (B) in male tail (inheritable by his male lineal descendants), then to S's younger sons in male tail (this being to cover the contingency of a failure in A's male line), and in the event of a total failure of male successors, one or more female descendants could be stipulated as heiresses.³ The scheme worked as long as B did not bar the entail after A's death and sell the fee simple. To prevent B when he became entitled to the land on A's death from barring the entail and converting it into a fee simple, what would happen was that in A's lifetime when B came of age and needed financial assistance from his father, A and B would join in a re-settlement of the land. B would bar the entail and re-settle on A for life, remainder to B for life, remainder to B's eldest son in tail. In return, B would be granted an immediate income charged on the land.

This meant that the land was tied up for another generation and if a re-settlement was effected in each generation, the tenant for life had no power to sell the fee simple.⁴ It was devised to ensure that the tenant in tail never came into possession of the land, because if he did so, he might secure the land to himself and so defeat the whole purpose of the strict settlement.⁵ In this way the family estate might be made to descend generation after generation from one life tenant to another despite the rule against perpetuities.

³ For a detailed analysis of strict settlements, see M.R. Chesterman *Family Settlements on Trust: Landowners and The Rising Bourgeoisie in Law, Economy and Society 1750-1914: Essays in the History of English Law* edited by G.R. Rubin and D. Sugarman (1984) p. 124-167.

⁴ For a general discussion, see *Cheshire and Burn's Modern Law of Real Property* (16th edn 2000) by E.H. Burn p. 69-78, *Megarry and Wade The Law of Real Property* (6th edn 2000) by Charles Harpum paras. 8-011-8-018 and Kevin Gray *Elements of Land Law* (2nd edn 1993) ch. 15. Kevin Gray and Susan Francis Gray *Elements of Land Law* (3rd edn 2001) only briefly covers the topic p. 646-653.

⁵ See A.H. Manchester *Modern Legal History* (1980) p. 311 and A.W.B. Simpson *A History of the Land Law* (2nd edn 1986) p. 235ff.

In reality many sons did not reach the age of majority in their father's lifetimes so most re-settlements were made voluntarily when they came to marry.⁶ Alternatively, a settlement was made on death in the will of the father. Settlements were also used to provide portions⁷ for the younger children and a jointure⁸ for the widow.⁹ It was the estate itself which met the cost of such provision and to meet his financial obligations, the life tenant might have to mortgage his estate.¹⁰ The types of entailed interests were tail male (where only the male heirs can inherit), tail female (female heirs only) and tail general (male and female heirs) and any of these forms could be made special by limiting the issue to the issue by a particular wife or husband.¹¹

Settlements have been common since the early thirteenth century. Statute *De Donis Conditionalibus* was passed in 1285 to preserve settlements according to the donor's intention and it rendered land virtually inalienable.¹² The result of this Statute was the appearance of a new kind of fee, the fee tail or in Latin *feodum talliatum* meaning a cut-down fee, because the quantum of the estate was cut down since the right to inherit was restricted to the class of heirs mentioned in the gift.¹³ The fee tail was a rigid, unalterable, inalienable perpetuity and this continued for two hundred years after the Statute and indeed had mischievous effects.¹⁴ In the 1470's ways were found of barring the entail and converting it into a fee simple. Entails were not barrable until the issue was of full age and entails remained the basic ingredient of family settlements for centuries. The kind of settlement, which was perfected between 1640 and 1700 and remained in use for three hundred years, was the strict settlement.¹⁵

⁶ See generally J. H. Baker *An Introduction to English Legal History* (4th edn 2002) ch. 16 and J.H. Baker *The Oxford History of the Laws of England Vol. VI 1483-1558* (2003) ch. 36. Simpson *op. cit.*, p. 238 explains that if the bride and her children were to be protected from the risk that the groom might prove unreliable, it was essential that the groom's power of disposition be restricted.

⁷ Sums of money provided under a strict settlement of land for the benefit of the children of the settlor, other than the one who succeeds to the land.

⁸ Interest given to a widow for support by a rentcharge or annuity after her husband's death.

⁹ For a detailed discussion of the development of strict settlements, see Eileen Spring *Law, Land and Family: Aristocratic Inheritance in England 1300 to 1800* (1993) ch. 5 *The Strict Settlement*.

¹⁰ See Manchester *op. cit.*, p. 312.

¹¹ See Simpson *op. cit.*, p. 90ff.

¹² *Ibid.*, p. 81-102.

¹³ Baker *An Introduction to English Legal History op. cit.*, p. 273, William Searle Holdsworth *An Historical Introduction to the Land Law* (1927) p. 56.

¹⁴ Cheshire and Burn *op. cit.*, p. 271.

¹⁵ The expression is found in 1715: 1 P. Wms 291- see Baker *An Introduction to English Legal History op. cit.*, p. 293 footnote 67.

Chesterman analyses the period between the Civil War and the mid-eighteenth century (1640's to 1750) as a period of a great deal of land acquisition by the larger landowners,¹⁶ but thereafter land acquisition slowed down, because with the aid of the strict settlement, the great landed families sat firm on their estates.¹⁷ Chesterman perceives the period between 1750 and 1914 as marking the heyday and decline of strict settlements, since it was the period when substantial quantities of investments, for example government stocks and mortgages of land, came to be included in family trusts established by industrialists, merchants and other wealthy individuals whose personal capital was not wholly or predominantly bound up in land.¹⁸

Strict settlements by the mid-nineteenth century may have been imposed on as much as three-quarters of English land.¹⁹ The economic undesirability of tying up so much land in settlement was widely felt. Land could not be prised out of the landed families so those *nouveaux riches* could not acquire real property.²⁰ There were management problems from the point of view of the landed family.²¹ The owner, being only a tenant for life, could not exercise the necessary powers of leasing, mortgaging (mortgages were undertaken only in order to provide portions; they were rarely allowed for improvements), felling timber and mining that belonged to an absolute owner. Improvements could not be carried out without ways of raising cash and the fact that the life tenant's interest determined on his death did not encourage life tenants to invest their private funds in settled land. Broad powers, however, could be expressly conferred on the tenant for life by each individual settlement.

Many landowners, however, were compelled to seek private Acts of Parliament. Eventually the most commonly needed powers such as powers of leasing, selling, exchanging and partitioning settled land were conferred by public general statutes on

¹⁶ Chesterman *op. cit.*, p. 132 relying on Sir John Habakkuk *Marriage Settlements in the Eighteenth Century* in *Transactions of the Royal Historical Society* 4th Ser. XXXII (1950) p. 15-30.

¹⁷ Other writers argue against this, such as Eileen Spring *The Settlement of Land in Nineteenth Century England* in *American Journal of Legal History* VIII (1964) pp. 209-223 and L. Bonfield *Marriage Settlements and the Rise of The Great Estates: The Demographic Aspect* in *Economic History Review* 2nd Ser. XXXII (1979) p. 483-93.

¹⁸ Chesterman *op. cit.*, p. 126ff.

¹⁹ *Ibid.*, p. 130.

²⁰ See Baker *An Introduction to English Legal History op. cit.*, p. 295.

²¹ Simpson *op. cit.*, p. 239 highlights how there were grave disadvantages in subjecting a large portion of the country to the management of a series of life tenants.

all tenants for life with leave of the court by the Settled Estates Acts 1856 and 1877.²² The continuing sentiment which favoured strict settlements was shown by the fact that the state chose not to abolish the strict settlement but to assist it to adapt to modern needs.²³

Great reform came in the 1880's when the great agricultural depression gave rise to strong desires among landowners to be able to convert land into more profitable investments.²⁴ The Settled Land Act 1882 was passed to give every tenant for life power to sell the land in fee simple. When he sold, the settlement was not destroyed but attached to the proceeds of sale. The substance of the Settled Land Act 1882 was reproduced in the 1925 legislation though certain extensions and alterations of the statutory powers were made.²⁵ After 1925 the legal estate had to be vested in the tenant for life but his powers were restricted.

Strict settlements survived as a means of ensuring that the estates of the nobility followed the peerage titles, which were usually limited in tail male. Eileen Spring²⁶ summed up strict settlements in three words: patrilineal, primogenitive and patriarchal. Settlements sprang from a society already patrilineal and primogenitive in its beliefs, but in giving the aristocratic ethos a legal vehicle, settlements went far to strengthen it. The basic objective of aristocratic settlement strategies was to exclude women from any effective form of land ownership.²⁷

The taxation system had a large part to play in the decline of strict settlements during the twentieth century.²⁸ Estates became vulnerable to high taxation (estate duty) on the death of the life tenant, since taxation fell on the full capital value of the estate on the termination of each successive interest.²⁹ The declining rates of return from agriculture and other economic factors also played a part. Social and political

²² For more details, see Simpson *op. cit.*, p. 284-286.

²³ See Manchester *op. cit.*, p. 313.

²⁴ See Baker *An Introduction to English Legal History op. cit.*, p. 295.

²⁵ For a detailed analysis, see Megarry and Wade *op. cit.*, paras. 8-011-8-108.

²⁶ *Law, Land and Family: Aristocratic Inheritance in England 1300 to 1800 op. cit.*, p. 144.

²⁷ Alain Pottage *Proprietary Strategies: The Legal Fabric of Aristocratic Settlements* (1998) 61 M.L.R.162.

²⁸ See Manchester *op. cit.*, p. 315.

²⁹ Estate duty was introduced by the Finance Act 1894: see Gray (2nd edn) *op. cit.*, p. 608.

developments, together with the growth of commercial and industrial capital,³⁰ meant that profit-yielding investments outside the possession of land were increasingly available to attract wealth. The trust of investments (including stocks and shares) was the form of family settlement which merchants and industrialists developed in rivalry to strict settlements.

REASONS SOLICITORS STATED IN THE QUESTIONNAIRE THAT STRICT SETTLEMENTS WERE SET UP

10 solicitors³¹ gave (a) as their reason [(a)- as a medium for intergenerational transfer of wealth within the family].

2 solicitors³² gave (a) and (b) as their reason [(b) as a means of protection of individual beneficiaries].

3 solicitors³³ gave (c) only as their reason [(c) other purpose].

1 solicitor³⁴ gave (a), (b) and (c) as his reason.

1 solicitor³⁵ did not answer the question.

John Glasson (Eversheds) creatively set them up in a matrimonial context. He stated that, *'The divorce department would make the arrangements and the trusts department would be asked what trust should be used. If a wife was living in the matrimonial home with children, it was only reasonable that she should be in the position of an absolute owner. She was given a life interest and the husband had a remainder interest. The Settled Land Act procedure was most appropriate as it seemed to me reasonable to give her a power of sale rather than compel her to go cap in hand to the trustees if she wanted to move house. The choice of new property would also be hers. It gave the wife as much real control as possible. You cannot do it now because you would have to persuade trustees to delegate the power of sale to the wife. Trustees are very cautious.'*

³⁰ See *Chesterman op. cit.*, p. 166.

³¹ Allen and Overy, Boodle Hatfield, Burges Salmon, Charles Russell, Herbert Smith, Linklaters and Alliance, May, May and Merrimans, Payne Hicks Beach, Speechly Bircham and Withers.

³² Farrer and Co and Wiggin and Co.

³³ Eversheds, Official Solicitor and Public Trust Office.

³⁴ Macfarlanes.

³⁵ Currey and Co.

This demonstrates that new uses could be found for strict settlements and it may be regrettable to prevent creative usage by legislative means where there is scope for manoeuvre.

TO WHAT EXTENT WERE SOLICITORS CREATING STRICT SETTLEMENTS ON DIVORCE?

I tried to assess the extent to which solicitors were creating strict settlements on divorce. To this end, I devised a short one page questionnaire which comprised the following questions:

1. Have you created strict settlements on divorce?
 - (a) Yes
 - (b) No
2. If the answer to question 1 is yes, approximately how many have you created?
 - (a) 1-5
 - (b) 5-10
 - (c) 10-20
 - (d) More than 20
3. Why did you create them?
4. Are you trying to achieve the Settled Land Act effect using the 1996 Act?
 - (a) Yes
 - (b) No

If yes, please explain how?

5. Were you disappointed when the Trusts of Land and Appointment of Trustees Act 1996 was passed which meant that you could no longer create strict settlements on divorce? Please explain your answer.

I sent the questionnaire in January 2000 to 18 family law firms selected from *The Legal 500: The Clients' Guide to UK Law Firms*³⁶ together with a stamped addressed envelope. After extensive chasing, I received 13 replies (some by telephone). The replies were from the following firms: Anthony Gold Lerman and Muirhead, Bates

³⁶ (12th edn 1999) edited by John Pritchard.

Wells and Braithwaite, Charles Russell, David Truex and Co, Dawson and Co, Kingsley Napley, Manches, Miles Preston and Co, Mishcon De Reya, Reynolds Porter Chamberlain, Russell Jones and Walker, Stephenson Harwood and Withers. Of these firms, only 2 had created strict settlements on divorce- Stephenson Harwood and Mishcon De Reya.

Jonathan Walsh (Stephenson Harwood) had created 5 to 10 strict settlements over a 5 year period from early 1980's to mid-1980's and stopped after the mid-1980's. He created them because they seemed appropriate and what was required. He used them where a couple was divorced and the wife was given a right to income or the right to live in the house for life or until re-marriage. After the mid-1980's case law meant that this was frowned upon, because cases showed that broadly the wife was entitled to the house and capital outright. For this reason he was not disappointed when one could no longer create them after 1996. He is not trying to achieve the Settled Land Act effect using the 1996 Act.

Katherine Waldemar Brown (Mishcon De Reya) created up to 5 strict settlements on divorce. She created them to allow the wife to live in the house which was beyond her means, for the sake of the children, when her entitlement was in fact less. The wife was given an interest for life or until the children were grown up when the house would be sold and the proceeds divided. The last strict settlement Ms Waldemar Brown tried to create was in 1996 when her firm was acting for the husband and she asked for an interest for the wife for life or until the children were grown up. It was a short marriage; there was a lot of money and the children were young. The judge would not agree to this. He awarded the house to the wife outright. Ms Waldemar Brown was not disappointed when the 1996 Act was passed, because strict settlements were used extremely rarely. She is not trying to achieve the Settled Land Act effect using the 1996 Act.

DID SOLICITORS STATE THAT THE NUMBERS OF STRICT SETTLEMENTS HAVE BEEN DECLINING?

Only 2 solicitors³⁷ specifically stated that the numbers were not declining stating the reason that strict settlements continue for a long time. Of those who stated that they

³⁷ May, May and Merrimans and Payne Hicks Beach.

had been declining, the comments of William McBryde (Assistant Official Solicitor) are illuminating. He commented, '*There are not very many and you rarely come across them. I have been doing trusts in this office now for thirty years. There were certainly more when I came in. I was used to them. When I was in private practice, we had quite a lot. I was in a small firm in Northumberland which was an old established farming-based country-town practice where we had a lot of very old established clients including some of the local landed estates. But even then we were breaking the settlements and winding them up. But most of the other strict settlements were created by accident by will.*' This highlights that even strict settlements which had been common in north-east England were declining.

Some of the solicitors consulted by the Law Commission in *Transfer of Land: Trusts of Land*³⁸ did favour the retention of the existing dual system³⁹ (trust for sale and strict settlement) and suggested that there is a need for Settled Land Act settlements or their functional equivalent. The Law Commission declared that originally the two systems performed different functions⁴⁰ but that due to reforms,⁴¹ many of the differences between the two systems had been removed. Crucially, the Law Commission stated that in either system the land can be sold and thus the strict settlement was no longer an effective method of keeping land in the family.⁴²

This statement is an overhasty summary of a far more complex situation, since inevitably family pressure had a role to play in keeping land in the family. However, the information which the Law Commission received in response to the Working Paper confirmed that although some strict settlements are currently in existence, very few new settlements are being created. Only one firm expressly proposed creating

³⁸ Law Com. No. 181 (1989).

³⁹ *Ibid.*, para. 1.6. The Report does not specify how many favoured the retention of the existing system.

⁴⁰ Quoting para. 3.2 of the Working Paper No. 94 *Trusts of Land* (1985)- the strict settlement was to keep land within the ownership of a particular family and the trust for sale was used where a sale was intended or the land was bought as an investment.

⁴¹ The Settled Land Act 1925 increased the powers of the tenant for life and the Law of Property Act 1925 section 1 prevented life interests from existing as legal estates, so that all settlements had to take effect behind a trust.

⁴² Sale could, however, be prevented by leaving a remainder interest contingent on the property being unsold at the death of the life tenant and no sale being permissible without the remainderman's consent: see *Re Inns* [1947] Ch. 576 at 582.

new settlements in the future.⁴³ The Law Commission was of the view that if the powers of delegation held by trustees of land are broadened, settlors will be able to create what is in effect an ‘enhanced’ strict settlement,⁴⁴ although such a settlement would not be precisely the same as a strict settlement, because the trustees will retain the legal title. The Law Commission therefore concluded⁴⁵ that there should be no new strict settlements but existing settlements will continue as Settled Land Act settlements.

The prevention of new strict settlements and continuation of existing strict settlements- are the provisions sufficiently exhaustive and comprehensive?

Prevention of new strict settlements

Section 2(1) of the 1996 Act states that, ‘No settlement created after the commencement of this Act is a settlement for the purposes of the Settled Land Act 1925; and no settlement shall be deemed to be made under that Act after that commencement.’ The prohibition applies to settlements created under section 1(1) Settled Land Act and settlements deemed to be settlements by that Act. This means that any attempt to create a strict settlement will result in a trust of land. Section 2(1) is well drafted, is a straightforward means of achieving this result and has not left any loopholes. Existing Settled Land Act settlements, however, are unaffected and will continue as Settled Land Act settlements. This means that where a strict settlement was created accidentally, the Act does nothing to convert it into a trust of land. Before answering the question why such a stance was taken, it is first of all necessary to analyse the exact provisions which apply to existing settlements.

Continuation of existing strict settlements

Subsection (2) makes it clear that there will still be a Settled Land Act settlement where there is an alteration of an interest in, or of a person becoming entitled under, a settlement which exists at the date the Act came into force (1 January 1997) or where the settlement derives from a settlement which exists at the date the Act came into

⁴³ See footnote 72 in para. 4.3 of the Law Commission Report.

⁴⁴ The Law Commission *op. cit.*, para. 4.5 recognised that there are situations in which the strict settlement might be preferred to the trust for sale or trust under the new system. This will continue by way of the delegation of powers under a trust of land. See also para. 4.11.

⁴⁵ *Op. cit.*, para. 8.3.

force. Section 2(2) states that, 'Subsection (1) does not apply to a settlement created on the occasion of an alteration in any interest in, or of a person becoming entitled under, a settlement which- (a) is in existence at the commencement of this Act, or (b) derives from a settlement within paragraph (a) or this paragraph.' The only way in which it will not be a settlement is if provision is made to that effect in the instrument by which it is created,⁴⁶ thus giving an opportunity to convert it to a trust of land. This is contained in section 2(3) which states that, 'But a settlement created as mentioned in subsection (2) is not a settlement for the purposes of the Settled Land Act 1925 if provision to the effect that it is not is made in the instrument, or any of the instruments, by which it is created.' This provision gives a resettlement an opportunity to become a trust of land, thus furthering the policy of the Act to establish the trust of land as the norm.

Kenny and Kenny have pointed out that, 'This provision will doubtless be used extremely rarely, and its operation is not so straightforward as appears at first sight. This provision confers no new powers upon trustees and they will still only be able to vary or appoint under a settlement in the manner permitted by the settlement, otherwise there will be a breach of trust. Providing these powers are sufficient to allow creation of a derivative settlement which is not a settled land settlement, this subsection can be relied upon.'⁴⁷ It is correct to say that this provision will be used extremely rarely, since none of the solicitors interviewed for the questionnaire mentioned using it in the general discussions I had with them when they had an opportunity to comment. It is difficult to accept, however, that its operation is 'not so straightforward' and no cogent argument is used to support this contention. As to the argument that, 'This provision confers no new powers upon trustees', any legal adviser drafting the resettlement would surely be negligent if he or she did not exclude the provisions of the Settled Land Act 1925 and enable the trustees, *inter alia*, to have the benefit of wider powers under section 6 of the 1996 Act. Proper drafting should avoid the problems which Kenny and Kenny fear.

⁴⁶ A separate document will therefore not suffice: see Chris Whitehouse and Nicholas Hassall *Trusts of Land, Trustee Delegation and the Trustee Act 2000* (2nd edn 2001) para. 2.13 footnote 6.

⁴⁷ Phillip Kenny and Ann Kenny *The Trusts of Land and Appointment of Trustees Act 1996* (1997) p. 5.

However, no such provision applies to settlements generally. Is this a skilfully considered provision or an ineptly designed strategy? The policy underlying the legislation, as previously stated, is to eliminate strict settlements by a gradual process and as Barraclough and Matthews stated, ‘What the 1996 Act gives us is not instant abolition, but the prospect of their eventual extinction through rigorous birth control.’⁴⁸ What Barraclough and Matthews do not state, however, is that no method of birth control is one hundred percent reliable, whereas the birth control envisaged by section 2(1) is infallible. Yet the underlying reason why the option was not given to convert existing strict settlements into trusts of land must have been that to divest an existing tenant for life of subsisting rights would infringe the tenant for life’s human rights and would require proper compensation. In this sense, therefore, this provision is satisfactory and was a sensible policy decision, although one which admittedly could have been the antithesis in order to expedite a speedier demise of strict settlements and facilitate the conversion of strict settlements created accidentally into trusts of land.

Adding new land to a strict settlement

Where new land is brought into a strict settlement, will that land be held under the strict settlement or a trust of land? The Law Commission Report stated that, ‘If an existing settlement acquires more land, that land will be held under the new system.’⁴⁹ Clause 13 of the draft Bill⁵⁰ attached to the Law Commission Report had that effect. Section 2 of the Act, however, does not have that effect⁵¹ and is worded totally differently. Section 10 of the Settled Land Act 1925 which states that, ‘Where.... land is acquired with capital money arising under this Act, the land shall be conveyed to the tenant for life’ will still apply since it has not been repealed, so the question arises where capital money is used to buy further land, whether the land will remain

⁴⁸ Hugh Barraclough and Paul Matthews *A Practitioner’s Guide to the Trusts of Land and Appointment of Trustees Act 1996* (1996) para. 2.1.

⁴⁹ Law Com. No. 181 para. 8.3.

⁵⁰ ‘Land shall not be or deemed to be settled land for the purposes of the Settled Land Act 1925 by virtue of being or being deemed to be subject to a settlement, unless it was or was deemed to be such land by virtue of being or being deemed to be subject to that settlement immediately before the commencement of this Act and has remained so since.’ The Explanatory Notes to clause 13 in the Trusts of Land Bill state, *inter alia*, that there should be no addition to settled land held under existing settlements.

⁵¹ See Barraclough and Matthews *op. cit.*, para. 2.4, who state that clause 13 carrying the Law Commission’s proposal into effect are not repeated in the Act and section 2 does not say or imply that.

settled land. It is worth noting that in the Explanatory and Financial Memorandum attached to the Bill in the House of Lords, it states under clause 2 that, 'An existing settlement can have new land added to it'.

Sydenham states that, 'where new land is brought into an existing strict settlement, it will continue to be governed by the Settled Land Act 1925.'⁵² She does not, however, give any reasoning or amplify her statement but is presumably referring to a settlor adding land by way of gift to the Settled Land Act settlement. By way of contrast, Whitehouse and Hassall state that, 'Further property cannot be added to an existing settlement. In such a case further property, being land, will be held on a trust of land.'⁵³ The footnote to this⁵⁴ recognises that if capital money is used to buy the land, section 10 of the Settled Land Act 1925 will apply so that the land would be settled land. This is different from Settled Land Act trustees using proceeds of sale of Settled Land Act land to buy new land. The problem with the assumption behind their general statement is that predominantly capital money would be used to purchase further property which means that their general statement at face value needs to be inverted.

I wrote to Nicholas Hassall who clarified⁵⁵ the point as follows: 'I think that paragraph 2.11 on page 22 of the book of which Whitehouse and I are the co-authors is looking at a rather definite scenario. I think it refers to the situation where you have a Settled Land Act settlement which was in existence, necessarily, prior to 1st January 1997 and the settlor wishes to add further land which he owns beneficially to that settlement. Prior to 1st January 1997 he could have conveyed the land to the tenant for life as an addition to the settlement. However the general view is that if a settlor attempted to do that after 1st January 1997 he would be creating a referential settlement, which would be a new settlement and since you cannot create a new Settled Land Act settlement after 1st January the land would not be subject to a strict settlement but would be held as a trust of land. I would add that this is the

⁵² See Angela Sydenham *Trusts of Land-The New Law: Trusts of Land Appointment of Trustees Act 1996* (1996) p. 84.

⁵³ *Op. cit.*, at para. 2.13.

⁵⁴ Footnote 2 states that, 'The position may of course be different if capital money is used to acquire further land when the Settled Land Act 1925 s10 will apply assuming that there is never a moment when the settlement does not include "relevant property."'

⁵⁵ In a letter to me dated 4 January 2000.

conventional view concerning attempted additions of land after 1st January 1997 to a strict settlement and is the view taken by the Land Registry. I think on the other hand it would be possible for a settlor of a pre-1997 Settled Land Act settlement to make an addition of money to the capital cash of the settlement which addition could then be used to purchase land which would be subject to the same settlement. What I have said above and what is said in the book represents the conventional view. I have always wondered a little about it. In practice where additions are made we tend to draw a distinction between purely referential trusts, where a new settlement is created by reference to trusts of an existing settlement, and an addition to an existing settlement where a settlor adds funds which are to be held as part of the same trust fund. I have always wondered whether the latter is really a referential settlement and is therefore caught by section 2(1) of the Act. However the conventional view is as expressed in the book and as I have already stated it.'

Thereafter, I wrote to the Land Registry and was informed⁵⁶ that if a settlor wishes to add land which he owns beneficially to that settlement after 1st January 1997 or cash is used and added to the settlement after 1st January 1997, the Land Registry's view is that a referential settlement is being created which is a fresh settlement and caught by section 2(1). The reason is that the land and cash do not form part of the settlement prior to 1st January 1997. This view is in accordance with the policy of the Act to restrict strict settlements as much as possible; any other view could lead to the proliferation of strict settlements.

Both land and cash added to the settlement after 1st January 1997 should be treated as referential settlements and thus caught by section 2(1),⁵⁷ which is the Land Registry view. This means that section 10 of the Settled Land Act 1925 will not apply to cash added to the settlement after 1st January 1997, but will apply where settled land is sold and that capital money is used to buy new land and also where settled land is exchanged for other land. What is problematic is the initial complication that section 2 has not been drafted in such a way to make it clear that a referential settlement is

⁵⁶ In a letter to me dated 3 February 2000 from Ms S Wheeler, Assistant Land Registrar.

⁵⁷ This is despite the fact that the formalities required for both are different: land added to the settlement will require writing in accordance with section 53(1)(b) Law of Property Act 1925 whereas a trust of cash declared by reference to the old settlement can be oral or in writing.

considered a new settlement for the purposes of section 2(1) and clearer drafting would have been welcome in this subsection.

Cessation of strict settlement?

A strict settlement ceases to exist when there is no 'relevant property' in the strict settlement. Section 2(4) states that, 'Where at any time after the commencement of this Act there is in the case of any settlement which is a settlement for the purposes of the Settled Land Act 1925 no relevant property which is, or is deemed to be, subject to the settlement, the settlement permanently ceases at that time to be a settlement for the purposes of that Act.' 'Relevant property' is defined in section 2(4) as 'land and personal chattels to which section 67(1) of the Settled Land Act 1925 (heirlooms) applies'. Do personal chattels exclude money so that if all the land is sold and the trustees hold the proceeds of sale, the settlement has ceased to exist? There is no definition of personal chattels in the Settled Land Act 1925.⁵⁸ A statutory definition is to be found in the Administration of Estates Act 1925⁵⁹ and this clearly excludes money. There is no reason for a different definition to be given in the Settled Land Act.

Therefore, if there ceases to be any land or heirlooms subject to the settlement, but merely capital money, the settlement comes to an end.⁶⁰ Accordingly any land which later becomes subject to the settlement bought with the proceeds of sale will be held on a trust of land.⁶¹ This further ensures the phasing out of strict settlements and means that trustees need to retain part of the land, however small, or heirlooms, however low in value, for the strict settlement regime still to apply. If the tenant for

⁵⁸ The heading to section 67 Settled Land Act 1925 refers to 'sale and purchase of heirlooms under order of court'. Money is not an heirloom. Robert Megarry and H.W.R. Wade *The Law of Real Property* (5th edn 1984) p. 370 state that the Settled Land Acts are not in general concerned with chattels but they have made special provision for personal chattels settled so as to devolve with settled land. Megarry and Wade note that furniture, pictures, armour and other family possessions, if settled along with land, are now governed by the Act of 1925. They state that 'such things are often, though inaccurately referred to as "heirlooms"'.

⁵⁹ Section 55(1)(x) states that personal chattels do not include money.

⁶⁰ See Megarry and Wade *op. cit.*, para. 8-027 footnote 21.

⁶¹ This is reinforced by Schedule 1 para. 6 which states that, 'Where a settlement ceases to be a settlement for the purposes of the Settled Land Act 1925 because no relevant property (within the meaning of section 2(4)) is, or is deemed to be, subject to the settlement, any property which is or later becomes subject to the settlement is held in trust for the persons interested under the settlement.' See Barraclough and Matthews *op. cit.*, para. 2.4.

life sells land simultaneously purchasing replacement land, there is still relevant property and accordingly a Settled Land Act settlement, but if the sale is concluded any time before the purchase is completed, there is then a moment when there is no relevant property so the Settled Land Act regime will not apply.⁶²

WERE THE CLIENTS OF SOLICITORS SATISFIED WITH THE SYSTEM OF STRICT SETTLEMENTS?

6 solicitors⁶³ stated that their clients were satisfied with the system of strict settlements.

3 solicitors⁶⁴ stated that their clients were not satisfied with the system of strict settlements.

7 solicitors⁶⁵ stated that their clients were partly satisfied with the system of strict settlements.

1 solicitor⁶⁶ did not answer the question.

It appears that the satisfied clients were normally satisfied from a position of ignorance, a passive type of acceptance, rather than satisfaction from an informed position as demonstrated by Christopher Jessel (Farrer & Co) who stated that, *‘Most clients did not understand and the traditional families accepted them the way they were. They do not fit in easily with modern ideas of trusts. Families who were used to them and knew how they worked were happy with them.’*

Yet if the system was working for these clients, this must surely speak for itself. It was an inherited system which was fine for those who set up their estates in the way that they had. Those who were either satisfied or partly satisfied constituted a large majority. Those who expressed dissatisfaction stressed the inflexibility of the system, the fact that it was not a system which clients wanted to use in a modern environment, the desire of their clients to do other things rather than follow strict settlements and

⁶² See Whitehouse and Hassall *op. cit.*, para. 2.13 footnote 4.

⁶³ Currey and Co, Farrer and Co, Linklaters and Alliance, Macfarlanes, May, May and Merrimans and Withers.

⁶⁴ Burges Salmon, Official Solicitor, Payne Hicks Beach.

⁶⁵ Allen and Overy, Boodle Hatfield, Charles Russell, Eversheds, Herbert Smith, Speechly Bircham, Wiggin and Co.

⁶⁶ Public Trust Office.

the problems which arose in the the litigation about the Blenheim estate where the tenant for life was not thought to be a suitable person to exercise the conveyancing powers.⁶⁷

WERE SOLICITORS THEMSELVES SATISFIED WITH THE SYSTEM OF STRICT SETTLEMENTS?

4 solicitors⁶⁸ stated that they were satisfied with the system of strict settlements.

4 solicitors⁶⁹ stated that they were not satisfied with the system of strict settlements.

9 solicitors⁷⁰ stated that they were partly satisfied with the system of strict settlements.

Significantly a clear majority were either satisfied or partly satisfied. A trend noticed whilst interviewing was that solicitors who had the least experience were generally glad that solicitors could not create them in the future. Those who had a great deal of experience with them exhibited a supreme fondness for them and whilst recognising their deficiencies, retained an overall affection for them. However, even amongst those who had extensive experience, there was no doubt that the system was in need of reform.

At one extreme William Hancock (Speechly Bircham) expressed the view that, '*It was always thought that the system was a well-drafted Act of Parliament. The system did work well.*' Yet the view of Christopher Jessel (Farrer and Co) epitomised the mixed views expressed by many of the solicitors. He stated that, '*Advantages (a) Simplicity: a lot of thought went into the legislation. The Settled Land Act 1925 was good legislation for its time but was hopelessly out of date. (b) Legal estate in the tenant for life made it simpler because he was the person running the show. Disadvantages (a) Out of date. (b) Powers of trustees of management and of tenant for life were far too narrow. The straightforward statutory regime was not*

⁶⁷ See *Hambro v. Duke of Marlborough* [1994] Ch. 158 where the eleventh Duke of Marlborough did not trust his irresponsible son, the Marquess of Blandford, and so applied to the court proposing a new scheme varying the beneficial interests even though his son did not consent.

⁶⁸ Currey and Co, May, May and Merrimans, Speechly Bircham and Withers.

⁶⁹ Burges Salmon, Linklaters and Alliance, Payne Hicks Beach and Public Trust Office.

⁷⁰ Allen and Overy, Boodle Hatfield, Charles Russell, Eversheds, Farrer and Co, Herbert Smith, Macfarlanes, Official Solicitor and Wiggin and Co.

satisfactory. It could be made to work by a well-drafted instrument. It was in need of reform if it was going to continue.'

The success of strict settlements depended partly on the personal qualities of the tenant for life. Co-operation between trustees, tenant for life and professionals was necessary for the system to work well. If land was being put in trust to make it as difficult as possible for an individual member of the family to sell the land, a strict settlement should not be set up, since this gave the tenant for life power to sell the land. William McBryde (Assistant Official Solicitor) attributed the breaking and winding up of settlements partly to tax reasons and partly to the powers of trustees and life tenant never really being adequate for modern land management. He highlighted many innovations since 1925 such as agricultural and woodland grants that were difficult to deal with under a strict settlement and were much easier to organise under a trust for sale. His comments emphasise the necessity for change and how some solicitors found the system too archaic to be of contemporary use.

WAS THE INADVERTENT CREATION OF STRICT SETTLEMENTS A PROBLEM?

14 solicitors⁷¹ stated that they were aware of strict settlements being created inadvertently.

3 solicitors⁷² stated that they were not aware of strict settlements being created inadvertently.

These figures help to reveal the huge scale of the problem of accidental creation.⁷³ Christopher Jessel (Farrer & Co) explained the situations in which they were most commonly created accidentally- *'Accidental charitable section 29 Settled Land Act ones were very common because people did not know what they were doing when transferring to charities. Also in wills, not just home-made ones, but also those*

⁷¹ Allen and Overy, Boodle Hatfield, Burges Salmon, Charles Russell, Eversheds, Farrer and Co, Herbert Smith, Linklaters and Alliance, Official Solicitor, May, May and Merrimans, Payne Hicks Beach, Public Trust Office, Speechly Bircham and Withers.

⁷² Currey and Co, Macfarlanes and Wiggin and Co.

⁷³ The Law Commission in Law Com. No. 181 para. 4.8 states that, 'The problem of the "unintended" strict settlement is perhaps the most immediate and substantial difficulty in the present system.' See also para. 4.2, para. 1.3 quoting para. 3.5 of Working Paper No. 94 and Mark P. Thompson *Modern Land Law* (2nd edn 2003) p. 237-239.

professionally drawn by a solicitor e.g. will to mother for life and then to the son. The proper way was to executors on trust for sale. If this were not done, there would be a strict settlement.'

It is most worrying that solicitors themselves were creating them accidentally. However, this problem could have been dealt with without preventing individuals creating strict settlements if they wanted to. This was well articulated by Murray Hallam (Withers) who stated that, '*There was no need to abolish strict settlements just to prevent them being created inadvertently.*' The approach adopted by the legislation has been to use a sledgehammer where such drastic measures were not necessarily warranted. It would have been sufficient if the onus of the statute had been reversed,⁷⁴ so that a trust of land would be created in all cases unless it was specifically stated that a strict settlement under the Settled Land Act 1925 was being created. This would have satisfied those solicitors who wished to retain the flexibility of being able to create strict settlements in the future.

WERE SOLICITORS PERTURBED THAT THE 1996 ACT PREVENTS CREATION OF NEW STRICT SETTLEMENTS?

5 solicitors⁷⁵ stated that they were perturbed that the 1996 Act prevents creation of new strict settlements.

10 solicitors⁷⁶ stated that they were not perturbed that the 1996 Act prevents creation of new strict settlements.

2 solicitors⁷⁷ stated that they were partly perturbed that the 1996 Act prevents creation of new strict settlements.

A sizeable minority were perturbed or partly perturbed at the prevention of creation of new strict settlements and expressed strong views in favour of having the choice to retain the ability to create strict settlements. This was well expressed by Roderick Steen (May, May and Merrimans) who stated that, '*It was a pity because it was not*

⁷⁴ The wide wording of section 1(1)(i) of the Settled Land Act 1925 has long been in need of amendment.

⁷⁵ Charles Russell, Currey and Co, May, May and Merrimans, Speechly Bircham and Withers.

⁷⁶ Allen and Overy, Boodle Hatfield, Burges Salmon, Herbert Smith, Linklaters and Alliance, Macfarlanes, Payne Hicks Beach, Official Solicitor, Public Trust Office and Wiggin and Co.

⁷⁷ Eversheds and Farrer and Co.

necessary to cut down on the options open to somebody. If someone wants to create a strict settlement, there is no reason not to allow it. Strict settlements ensure that the estate goes in line with the peerage. One could specify that the estate goes with the peerage to the eldest son. If someone wants to create entails, why should it not be allowed? The argument against that was that people made strict settlements when they did not mean to. The answer is that specific form of words should be used to create strict settlements.'

This view appears eminently reasonable and it is easy to sympathise with such a stance. It does, however, ignore the fact that the reform was prompted by the desire to bring an antiquated system to an end and to streamline and simplify the law. A desire to cling on to strict settlements emphasises the reactionary, conservative and traditional inclinations of these solicitors who favour retention of the *status quo*, albeit in a moderately modified manner rather than innovative reform. A more conciliatory attitude was expressed by Christopher Jessel (Farrer and Co) who explained that, '*My initial reaction was to argue against it. Our firm was consulted very early on in the Law Commission's proposals and consulted at various stages. The firm said consistently that it ought to be able to continue with strict settlements but it does need modernising. But so few people understand it now that it is probably sensible to get rid of it. I now accept it.*' This approach demonstrates that opposition to change is being replaced by reluctant acquiescence to reform.

DO ANY SOLICITORS' CLIENTS WANT TO CREATE NEW STRICT SETTLEMENTS BUT ARE NOW UNABLE TO?

3 solicitors⁷⁸ stated that their clients did want to create new strict settlements but are now unable to.

13 solicitors⁷⁹ stated that their clients did not want to create strict settlements.

1 solicitor⁸⁰ did not answer the question.

⁷⁸ Farrer and Co, Speechly Bircham and Withers.

⁷⁹ Allen and Overy, Boodle Hatfield, Burges Salmon, Charles Russell, Eversheds, Herbert Smith, Linklaters and Alliance, Macfarlanes, May, May and Merrimans, Official Solicitor, Payne Hicks Beach, Public Trust Office and Wiggin and Co.

⁸⁰ Currey and Co.

The minority view of Murray Hallam (Withers) that, '*There is still a market for strict settlements*' and of Christopher Jessel (Farrer and Co) that, '*A few traditional landed families might want to*' is tempered by the realism of Christopher Jessel's additional comment that, '*if you were going to have a Settled Land Act situation, and you trusted the beneficiary enough to be a tenant for life, you would probably trust him enough to be an absolute owner. The old style has probably gone.*' Inevitably, if a minority of solicitors still wish to create strict settlements, the inability to create strict settlements raises the issue whether a trust of land can be created to replicate a strict settlement.

How close can a trust of land approximate to a Settled Land Act settlement?

Although it is not possible to place the legal title in the tenant for life, there are three alternatives. First, a specific provision that trustees shall not dispose of the land without the consent of the tenant for life, and if directed by the tenant for life to make a disposition must do as directed, will in substance confer the same power upon the tenant for life as placing the legal title in the tenant for life. Section 8(2) of the 1996 Act recognises this where consent is needed. Section 6(6) will be applicable since it is a rule of equity that trustees must comply with the settlor's directions in the trust that confer equitable powers upon the tenant for life or protector⁸¹ with a special role in the life of the trust. Secondly, section 6(1) can be partly ousted by providing under section 8(1) that the power to dispose of land should be in the tenant for life and not the trustees so that trustees must implement a transfer of the legal estate vested in them.⁸² Thirdly, the power could be delegated by the settlor's trust instrument to the tenant for life rather than being delegated by the trustees.

All these options would further strengthen the position of the tenant for life, demonstrating that the 1996 Act can be used, abused and misused to recreate the position of the tenant for life. In fact, the position of the tenant for life can be stronger than under the Settled Land Act 1925, since there are no prevailing limitations on the powers of the tenant for life such as are contained in the Settled Land Act.⁸³ Further, paragraph 10 of Schedule 2 of the Trustee Act 2000 has amended section 75 of the

⁸¹ See Underhill and Hayton *Law Relating to Trusts and Trustees* by David J. Hayton (16th edn 2003) p. 29-34.

⁸² This was envisaged to a lesser extent by Law Com. No. 181 para. 10.2.

⁸³ See sections 38 to 75 of the Settled Land Act 1925.

Settled Land Act 1925 to diminish the power of the tenant for life under the Settled Land Act in respect of investment or application of capital money, since trustees now only have so far as practicable to consult the tenant for life and so far as consistent with the general interest of the settlement give effect to his wishes.⁸⁴ Prior to the Trustee Act 2000 investment by trustees was to be made according to the direction of the tenant for life.⁸⁵ Thus a resurgence of the omnipotence of the tenant for life is given potential by the 1996 Act to be utilised in a manner perhaps as yet unforeseen, but laying the embryonic seeds for future flexibility, development and evolution.

Conclusion

There is not wholehearted support for the measures taken in the Trusts of Land and Appointment of Trustees Act 1996. It was necessary to prevent the creation of accidental strict settlements and such reform would have been uncontroversial. Even though the prevention of creation of strict settlements has furthered the aim of modernising, simplifying and streamlining the law, the overwhelming impression given throughout numerous interviews was that it was not necessary to prevent strict settlements being created in the future. Strict settlements still have a role to play where land is associated with a title such as with the Duke of Westminster or on divorce or where it may be desirable to have a tenant for life in the driving seat. Resistance to change is, however, being superseded by acknowledgement that creative means can be devised to attempt to replicate the position of the tenant for life under the Settled Land Act within the trust of land regime.

⁸⁴ See paragraph 10(2) of Schedule 2 of the Trustee Act 2000.

⁸⁵ Section 75(2) of the Settled Land Act 1925.

CHAPTER 3- A UNITARY SYSTEM OF A TRUST OF LAND: HAS THE ACT MADE TRUSTS FOR SALE UNNECESSARY?

One of the perceived achievements of the 1996 Act was the introduction of a superficially simple concept by way of a trust of land. The trust for sale had been compulsory to create concurrent interests in land and was almost always used to create successive interests in land to prevent the application of the Settled Land Act 1925.⁸⁶ The Law Commission was of the view that a dual system of successive and concurrent interests in land was unnecessary and one system for successive interests would be sufficient so that Settled Land Act settlements should no longer be capable of being created.⁸⁷ In addition the trust for sale mechanism was not appropriate to the conditions of modern home ownership.

The imposition of a duty to sell had been wholly artificial and misleading because with the rise of owner-occupation and social and economic changes in the mid to late twentieth century, the intention of co-owners was to retain land primarily for occupation as a 'use' asset and not an investment asset.⁸⁸ Maitland referred to a mortgage transaction as 'one long *suppressio veri* and *suggestio falsi*',⁸⁹ and the same analogy could have been applied to co-ownership though not to successive interests. The Law Commission recommended⁹⁰ that there should simply be a trust of land in the case of concurrent and successive interests in land⁹¹ with trustees holding the legal estate on trust with a power to sell and a power to retain the land i.e. no duty of sale unless the settlor deliberately intended to create an express trust for sale but with a mandatory power to postpone sale.

⁸⁶ For a review of the history of the trust for sale, see John M. Lightwood *Trusts for Sale* (1927) 3 C.L.J. 59.

⁸⁷ See Law Com. No. 181 para. 1.3.

⁸⁸ *Ibid.*, para. 3.2 and Alain Pottage *Law Com. 181: Reforming Trusts of Land* (1989) 52 M.L.R. 683 at 684-685. See also Lorna Fox *Living in a Policy State: from Trust for Sale to Trust of Land* (2000) 22 Liverpool L.R. 59 at 60-62 and 78-80.

⁸⁹ F.W. Maitland *Equity* (2nd edn 1936) p. 182.

⁹⁰ Law Com. No. 181 para. 20.1.

⁹¹ Roger Smith *Property Law* (4th edn 2003) p. 346 notes that it is interesting that virtually none of the special features of the strict settlement have been thought worthy of adoption (though one exception is the deed of discharge which protects purchasers when the trust has come to an end: section 16).

Practitioners can conveniently start by thinking of the new trust of land as being the old trust for sale minus any implied duty to sell, plus practically extended powers.⁹² The change from a trust for sale to a trust of land is an innovation conspicuous by its determinate banality. As Kenny and Kenny state,⁹³ the change of name to trusts of land is curiously insignificant. 'To lawyers brought up in the 1925 legislation it seems a portentous change but in itself it does nothing.'⁹⁴ There has been no fundamental reform of the 1925 legislation which remains substantially intact.

DO SOLICITORS THINK THAT HAVING A NEW UNITARY SYSTEM OF A TRUST OF LAND IS AN IMPROVEMENT?

12 solicitors⁹⁵ stated that they thought that having a new unitary system was an improvement.

5 solicitors⁹⁶ stated that they thought that having a new unitary system was not an improvement.

Problems with trusts for sale were emphasised by George Duncan (Charles Russell) who asserted that, '*The previous system was deeply unsatisfactory in some respects It was deeply confusing that if you wanted to set up a trust under which land would be retained indefinitely in the family, the best way to do it was to use a trust for sale. That was enormously confusing to lay clients and pretty confusing even for professional advisers. It could make the drafting very, very complicated.*'

Modification was necessary with the recognition that trusts for sale no longer reflected the reality of contemporary methods of ownership of the family home.

Yet the new regime has its drawbacks, since successive interests are not adequately covered by the 1996 Act which focuses on co-ownership. This was explained by Chris Jarman (Payne Hicks Beach) who stated that, '*I think that so much of the Law Commission Report was focused on the system of co-ownership in tenants in common*

⁹² *Emmet and Farrand on Title* (19th edn 1986 looseleaf) by Julian Farrand and Alison Clarke R. 34 para. 22.001.

⁹³ *Op. cit.*, p. 48.

⁹⁴ This does seem to overstate the position but it does convey their point of view.

⁹⁵ Allen and Overy, Boodle Hatfield, Burges Salmon, Charles Russell, Eversheds, Farrer and Co, Herbert Smith, Linklaters and Alliance, Macfarlanes, Official Solicitor, Public Trust Office and Wiggin and Co.

⁹⁶ Currey and Co, May, May and Merrimans, Payne Hicks Beach, Speechly Bircham and Withers.

as opposed to successive interests under a trust. I entirely agree with what they were trying to achieve in the co-ownership context. ... But to extend their thinking, almost without thinking, to the successive interest trusts was not as good as it might have been.' This highlights the problem that successive interests have been sacrificed for the sake of uniformity and simplicity, although the delegation provisions, which will be examined later, rectify to a certain extent the lacunae created by the new legislation.

IS IT ADVANTAGEOUS TO HAVE A POWER TO SELL AND A POWER TO RETAIN LAND UNDER THE NEW TRUST OF LAND I.E. NO DUTY TO SELL?

13 solicitors⁹⁷ stated that it was advantageous to have a power to sell and a power to retain land under the new trust of land.

3 solicitors⁹⁸ stated that it was not advantageous to have a power to sell and a power to retain land.

1 solicitor⁹⁹ (6%) did not answer the question.

Two main points were highlighted by the solicitors' comments. First, the fact was emphasised that the reforms are beneficial for the co-ownership situation but not necessarily for the successive interest situation. This was explained by Chris Jarman (Payne Hicks Beach) who stated that, *'I think it comes down to a distinction between the co-ownership situation and the successive interest situation. In co-ownership I am sure it is advantageous that there is no overriding duty to sell because that is what people will actually understand much more. ...It may be a marginal disadvantage to have that position in terms of successive interests.'*

Secondly, the theme emerges as to how you can have a power to do two inconsistent things. This was underlined by William Hancock (Speechly Bircham) who explained that, *'I try to decide if I should have a trust to sell or a trust to retain assets.'*

Presumably if you have a power to sell and a power to retain and the trustee does not

⁹⁷ Allen and Overy, Boodle Hatfield, Burges Salmon, Charles Russell, Currey and Co, Eversheds, Farrer and Co, Linklaters and Alliance, Macfarlanes, May, May and Merrimans, Official Solicitor, Payne Hicks Beach and Withers.

⁹⁸ Herbert Smith, Public Trust Office and Speechly Bircham.

⁹⁹ Wiggin and Co.

want to do anything, nothing happens. I think it is better to spell out the situation. ... I do not like the idea of there being silence.'

Trust to retain with power to sell?

There should be a trust to retain or sell: there should be an underlying obligation of some sort.¹⁰⁰ Trustees must exercise powers unanimously¹⁰¹ and if they are divided, then they must have some guidance as to what they should do. They do not sell if they are divided and this shows a trust to retain with a power to sell. The Act is indeterminative on this point where trustees are in disagreement. In removing the duty to sell, the Act does not offer an intelligent alternative. A trust to retain with a power to sell would have accurately mirrored the true position and laid any legal fictions to rest. Hopkins states that,¹⁰² 'Despite the absence of an underlying obligation, the Act is biased against sale. The Act enables the settlor of an express trust to prevent sale, by removing the power of sale,¹⁰³ but not to compel sale. Even where the power of sale is not removed, the trustees invariably have a power to postpone sale.¹⁰⁴ Under the previous law the power to postpone sale could be removed by a settlor under section 25 of the Law of Property Act 1925.'¹⁰⁵ Due to the inviolability of the power to postpone sale, the trust of land is in substance a trust to retain and a power to sell.¹⁰⁶

¹⁰⁰ See Roger Smith *Trusts of Land Reform* [1990] Conv. 12 at 15. Smith states in footnote 18 that, 'Thus in *McPhail v. Douulton* [1971] A.C. 424 at 448, Lord Wilberforce refers to the narrow distinction between a power to distribute coupled with a trust to accumulate income and a power to accumulate coupled with a trust to distribute. A power to accumulate and distribute is not mentioned as a feasible analysis.' Lord Wilberforce's words do not, however, rule out a power to do both as a viable alternative. His silence on this point is not to be taken as a statement that this is not legitimate.

¹⁰¹ Smith *ibid.*, p. 15 footnote 19 states, *inter alia*, that a power to retain or sell would make sense if trustees acted by a majority decision.

¹⁰² Nicholas Hopkins *The Trusts of Land and Appointment of Trustees Act 1996* [1996] Conv. 411 at 414.

¹⁰³ Section 8(1).

¹⁰⁴ Section 4(1).

¹⁰⁵ Section 25(1) of the Law of Property Act 1925 states that, 'A power to postpone sale shall, in the case of every trust for sale of land, be implied unless a contrary intention appears.'

¹⁰⁶ This view is also held by Whitehouse and Hassall *op. cit.*, para. 2.36 who state that in practice what will occur is that the land will not be sold, so that the underlying position is that a trust of land comprises a power to sell backed up by (the equivalent of) a duty to retain and the Lord Chancellor's Department has confirmed in correspondence with them that this is their understanding of the position.

Problems with the power to postpone sale

It can be seen from section 4(1) that that this provision only applies where there is a trust for sale created by a disposition. Section 4(1) states that, 'In the case of every trust for sale of land created by a disposition there is to be implied, despite any provision to the contrary made by the disposition, a power for the trustees to postpone the sale of land; and the trustees are not liable in any way for postponing sale of the land, in the exercise of their discretion, for an indefinite period.' Where a trust for sale has not been created by a disposition, where it arises for example by implication of law,¹⁰⁷ there may be no power to postpone sale under section 4(1).

However, under section 6(1) the trustees will presumably have the power to postpone sale which cannot be excluded by section 8, since section 8 only applies in the case of a trust of land created by a disposition but there may be liability for an indefinite postponement unlike section 4.¹⁰⁸ A trust for sale would arise by implication of law where a trustee acts in breach of trust, for example by buying an asset which the trustee has no power to buy. This would be *ultra vires* and an immediate duty to sell the unauthorised investment would arise. In such a case of a breach of trust there ought to be no power to postpone sale. Where a power to postpone would arise under section 6(1), it is arguable that the rule of equity would apply under section 6(6) so that a trustee could not postpone sale.

If the power to postpone is excluded in an ordinary trust of land and all the trustees want to postpone sale,¹⁰⁹ it is irrelevant that there is no power to do so as the trustees have only a power to sell and no duty to sell and unless they decide to exercise this power of sale, they can legitimately postpone sale by not exercising the power of sale. This leads to the absurd position that there can be a trust of land with a power to sell stating specifically that the power to postpone sale is excluded, yet this direction is meaningless since the trustees do not have a duty to sell. This change in section 4(1) is therefore only significant for trusts for sale and was only contemplated by the Law

¹⁰⁷ See *Re Jenkins and H.E. Randall and Co's Contract* [1903] 2 Ch. 362 (purchase of land in breach of trust) and *Emmet and Farrand on Title op. cit.* R. 55 para. 22.024.

¹⁰⁸ See *Emmet and Farrand on Title ibid.*

¹⁰⁹ Trustees must be unanimous to exercise a power: see *Re Roth* (1896) 74 L.T. 50, *Re Hilton* [1909] 2 Ch. 548, *Re Mayo* [1943] Ch. 302, and *Cheshire and Burn op cit.* p. 220 especially footnote 19.

Commission for this purpose.¹¹⁰ Section 4(1) will only be of any assistance where all the trustees want to postpone sale. If the trustees are not unanimous, section 4(1) will not help them. In addition, the power to postpone only applies to a power to postpone the sale of land so if the trust is mixed and includes land and personalty, there is no power implied by section 4(1) to postpone the sale of personalty.¹¹¹

The wording of section 4(1) is also worthy of examination: 'the trustees are not liable in any way for postponing sale of the land, in the exercise of their discretion, for an indefinite period.' This wide wording mirrors the language used in section 25(2) of the Law of Property Act 1925.¹¹² Yet such immunity seems far too widely drafted. It would, indeed, be odd if there were no liability where a wasting leasehold was not sold due to postponement of sale and was held until it was worthless. This did not seem to pose a problem under the 1925 legislation and may not do under the 1996 Act.

Does, however, the immunity override a trustees' general duties,¹¹³ *inter alia*, to act in good faith,¹¹⁴ act honestly,¹¹⁵ consider from time to time the exercise of the power,¹¹⁶ and not unfairly benefit one beneficiary at the expense of another?¹¹⁷ It would seem that the section overrides the duty to consider the exercise of the power from time to time due to the words 'not liable in any way for postponing sale for an indefinite period.' Do the words 'not liable in any way' remove the duty to act in good faith or to act honestly or are these general duties saved by the words 'in the exercise of their

¹¹⁰ See Law Com. No. 181 para. 3.7.

¹¹¹ See Barraclough and Matthews *op. cit.*, para. 4.4 footnote 9a.

¹¹² Section 25(2) stated that, 'the trustees for sale shall not be liable in any way for postponing the sale, in the exercise of their discretion, for any indefinite period' The litigation on section 25 of the 1925 Act included cases showing a contrary intention such as *Re Rooke* [1953] Ch. 716 (where a direction by the testator to sell the farm as soon as possible was held to be a contrary intention thus excluding the power to postpone sale) and *Re Atkins' Will Trusts* [1974] 1 W.L.R. 761 (vesting of gift depends on time of sale).

¹¹³ For a detailed discussion of the trustees' duties as donees of powers, see Geraint Thomas *Thomas on Powers* (1998) ch. 6. See also Underhill and Hayton *op. cit.*, ch. 11.

¹¹⁴ *Gisborne v. Gisborne* (1877) 2 App. Cas. 300 (in the absence of *mala fides* the court would not interfere). Compare *Tempest v. Lord Camoys* (1882) 21 Ch. D. 571 (court will intervene if trustees act improperly or in a way which is wrong or unreasonable- obiter per L. Jessel M.R. and Cotton L.J.). See Maurice Cullity *Judicial Control of Trustees' Discretions* (1975) 25 U. of Toronto L.J. 99.

¹¹⁵ *Re Smith* [1896] 1 Ch. 71.

¹¹⁶ See *Re Gulbenkian's Settlements* [1970] A.C. 508 at 518 per Lord Reid and *Re Hay's Settlement Trusts* [1982] 1 W.L.R. 202 at 209, 210 per Megarry V.-C.

¹¹⁷ *Nestlé v. National Westminster Bank plc* [1993] 1 W.L.R. 1260.

discretion'? It would seem that the words 'not liable in any way' are qualified by 'in the exercise of their discretion' which means 'in the conscious *bona fide* exercise of discretion' so the trustees are not relieved of their basic duties.¹¹⁸

Can the broad exemption seemingly given by section 4(1) be reconciled with the view taken in older cases such as *Fry v. Fry*¹¹⁹ where Romilly M.R. held that trustees were liable for negligence in not selling the trust property where there was improper retention of unauthorised investments? Can it be reconciled with *Re Chapman*¹²⁰ and *Rawsthorne v. Rowley*¹²¹ where trustees were not liable for a loss arising through the retention of an authorised investment unless wilful default, which includes want of ordinary prudence on the part of the trustees, was proved? One way of limiting the broad exemption of section 4(1) is to tie section 4(1) with section 6(6) which only refers to the powers conferred by this section (i.e. section 6), but section 6(1) includes the power to postpone sale, so it can be said that the rules of equity still apply to section 4, so that *Fry v. Fry* and other such cases would still be decided in the same way.

By the same circuitous argument, under section 6(9)¹²² the duty of care under section 1 of the Trustee Act 2000, which applies from February 1 2001 to trustees of land when exercising the powers conferred by section 6, could be argued to apply to section 4(1) so that trustees are still overall bound by the duty of care. Thus a court would hold that trustees are liable for postponing sale where they are in breach of their duty of care or are not acting in good faith because section 4(1) is subject to section 6(6) and section 6(9).¹²³

¹¹⁸ Section 4(3) is a saving section for those who have claims arising before the commencement of the Act.

¹¹⁹ (1859) 27 Beav. 144.

¹²⁰ [1896] 2 Ch. 763.

¹²¹ [1909] 1 Ch. 409.

¹²² Inserted by the Trustee Act 2000 s. 40(1), Sch. 2, para. 45(3).

¹²³ It is odd that commentators are unperturbed by the immunity provided by section 4(1) and seemingly accept it at face value.

DO SOLICITORS STILL WANT TO CREATE AN EXPRESS TRUST FOR SALE SO INCLUDING A DUTY TO SELL?

12 solicitors¹²⁴ stated that they would still want to create an express trust for sale which would include a duty to sell.

5 solicitors¹²⁵ stated that they would not still want to create an express trust for sale which would include a duty to sell.

The distinction between trusts with successive interests and those with concurrent interests was stressed by Chris Jarman (Payne Hicks Beach)- *'If we are setting up a trust with successive interests, virtually always yes we are setting them¹²⁶ up. In the context of co-ownership, I am happy with the system. In the context of successive interests, it is appropriate to regard the property as an investment primarily.'* It appears too dogmatic to state unequivocally that with successive interests a trust for sale is appropriate, but not with concurrent interests, and this does not allow for individual circumstances to be taken into consideration. As a generalisation, however, his statement may have some validity.

This view should be contrasted with the view taken by John Glasson (Eversheds) who stated that, *'I was delighted to see the end of the trust for sale. Although the trust for sale has to be admired as a useful and ingenious conveyancing device, it has, in my view, little merit beyond this and is particularly unsuited to co-ownership of houses and to modern property development. It gave the law a bad name when explaining conveyances and wills to clients. Also it complicated the drafting of quite simple documents. ...Years ago I designed a will to do away with the trust for sale. You could not eliminate it completely. It was nonsense to explain to the client about a trust for sale. I would not want a trust for sale in a will now.'* This view does not allow for the flexibility which may be provided by a trust for sale where appropriate, yet epitomises the view of those who avoid creating trusts for sale.

¹²⁴ Allen and Overy, Boodle Hatfield, Burges Salmon, Charles Russell, Currey and Co, Farrer and Co, Linklaters and Alliance, Official Solicitor, Payne Hicks Beach, Speechly Bircham, Wiggin and Co and Withers.

¹²⁵ Eversheds, Herbert Smith, Macfarlanes, May, May and Merrimans and Public Trust Office.

¹²⁶ Referring to trusts for sale.

The status of trusts for sale

All the solicitors agreed that the Act should not have abolished the possibility of creating an express trust for sale, which is a significant finding as to the utilitarian value of creating trusts for sale. In the Second Reading of the Bill in the House of Lords on 1st March 1996, the Lord Advocate, Lord Mackay of Drumadoon, stated that,¹²⁷ 'Trusts for sale are abolished and existing trusts for sale become trusts of land from commencement.' Stephen Gold in an impetuous, hasty summary of the Act was incorrect to state¹²⁸ that, 'The Act abolishes trusts for sale (those existing when it comes in are killed off)'. Sydenham's view is that only those trusts for sale which are implied by statute are converted into trusts of land but not express trusts for sale since the duty to sell remains, although there is power to retain despite any provision to the contrary.¹²⁹

Hopkins, on the other hand, is of the view that the duty to sell remains in pre-commencement express trusts for sale, but such trusts do become trusts of land.¹³⁰ He retracted his original statement that '.... all trusts for sale in existence at the commencement of the Act are converted into trusts of land. This is achieved by removing the duty to sell.'¹³¹ Draper states that the conversion process is simply a generic reclassification that does not without more change the basic nature of the pre-commencement trust for sale.¹³²

The correct opinion is a combination of Hopkins' and Draper's views, since there is still a duty to sell but there is now a trust of land. Draper is correct that there is no provision which removes the duty to sell from trusts for sale created expressly before the Act, which is in direct contrast to section 5 and Schedule 2 of the Act, which removes the duty to sell from statutory trusts for sale arising prior to the Act. Thus unlike express trusts for sale, conversion in these cases is not simply a generic

¹²⁷ Parliamentary Debates (Hansard): House of Lords Official Report 5th Series Vol. 569 col. 1718.

¹²⁸ *The Civil Way* (1996) 146 N.L.J. 1351.

¹²⁹ *Letters* [1997] Conv. 242.

¹³⁰ *Letters* [1997] Conv. 243.

¹³¹ *Op. cit.*, p. 413.

¹³² Michael Draper *Reformation or Revolution?* (1999) 21 Liverpool L.R. 97 at 102-103.

reclassification, but a fundamental change to the basic nature of pre-commencement implied trusts for sale.¹³³

A trust for sale can still be created expressly and this is explicitly recognised by section 4(1).¹³⁴ Trustees will be under a duty to sell and must be unanimous¹³⁵ when they exercise the power to postpone sale which cannot be excluded. The only argument which can be advanced to support the view of the Lord Advocate and Gold is that section 6(1) clearly states that, 'For the purpose of exercising their functions as trustees, the trustees of land have in relation to the land subject to the trust all the powers of an absolute owner.' This does not recognise that trustees can have any duties at all and would *prima facie* negate any duty to sell under a trust of land.

Does section 6(1) leave room for a duty of sale to arise or is section 6(1) comprehensive in its coverage and rule out any duties existing? The better view is that the wording of section 6(1) does not exclude a trustee having a duty of sale under a trust for sale and is merely stating that the trustees of land have all the powers of an absolute owner. Section 6(1) does not deal with duties and does not prevent their existence. Section 4 is implicitly recognising the existence of a duty of sale and section 5(1) explicitly recognises that a trust for sale contains a duty to sell. Further proof is that the term trust for sale is still defined in section 205(1)(xxix) of the Law of Property Act 1925¹³⁶ albeit deleting three elements of the definition: the word 'binding', the words 'and with or without a power at discretion to postpone the sale' and the definition of 'power to postpone a sale'.

¹³³ *Ibid.*, p. 103-104.

¹³⁴ P.H. Pettit *Demise of Trusts for Sale and the Doctrine of Conversion?* (1997) 113 L.Q.R. 207 at 207-208 advances the following arguments in favour of the proposition that the 1996 Act has not abolished trusts for sale: the preamble to the Act does not refer to the abolition of trusts for sale but to amending the law in respect thereof; the definition of trust of land in section 1(1)(a) is any trust of property which consists of or includes land and section 1(2)(a) specifically states that this includes a trust for sale; section 3 clearly assumes that a trust for sale can exist as does section 4; section 17(4)(a) contains provisions in similar terms to section 1(2)(a).

¹³⁵ As laid down in *Re Mayo*.

¹³⁶ As amended by section 25(2) and Schedule 4 of the 1996 Act, the new definition reads: "Trust for sale", in relation to land, means an immediate trust for sale, whether or not exercisable at the request or with the consent of any person; "trustees for sale" mean the persons (including a personal representative) holding land on trust for sale.'

When will trusts for sale be created?

Inter vivos

In simple cases of co-ownership, especially the purchase of a matrimonial or quasi-matrimonial home, an express trust for sale is rarely justified. In *Williams on Wills*¹³⁷ three possible situations where a trust for sale might still be appropriate are set out. The first situation is where the settlor or testator particularly wants there to be an early sale, an express trust for sale would emphasise his intention, but would not impose any greater legal obligation to sell, because section 4 of the 1996 Act confers a non-excludable power to postpone sale. This view of section 4 is difficult to justify since section 4 cannot remove the underlying conceptual difference between a duty to sell and a power to sell and cannot equalise them in the eyes of the law. A trust for sale does impose a greater legal obligation to sell irrespective of section 4.

The second situation is where land is intended to be held as an investment, and not for the occupation of beneficiaries, the traditional trust for sale wording might be a way of emphasising this, although the strict legal position would probably be little or not at all different from one where there was no trust for sale. The third situation is where there is a gift of or including land, for example a gift of a residuary estate which includes land to two or more persons as tenants in common (or joint tenants) absolutely and beneficially, the minority in terms of value of their interests may have a stronger right to an immediate sale against the wishes of the majority if there is a trust for sale. If that is what is intended, section 11 of the 1996 Act should be excluded.

In all those three cases an expression of intention should be included as well as a trust for sale, because a trust for sale could always be there through continuing to use old forms, rather than because of specific intent, and it may be that the expressions of intention will be more decisive than the presence of a trust for sale. The intention will be important under section 15(1)(a) when a court decides an application under section 14, yet if an old form is used, even unintentionally, there will be a duty of sale which will prevail until an application is made under section 14.

¹³⁷ C.H. Sherrin, R.F.D. Barlow, R.A. Wallington, Susannah L. Meadway, Michael Waterworth (8th edn, 2002), Vol. 2 para. 200.56.

In a will

Trusts for sale in a will¹³⁸ are a more complex area. The view of Kenny and Kenny is that there is no need to include an administrative trust for sale in a will.¹³⁹ The view of Barraclough and Matthews is that there is no need to create a trust for sale of residue or of other property given to more than one beneficiary.¹⁴⁰ This raises the question of why a trust for sale for one beneficiary would be desirable. It would seem that a trust for sale would be more likely where there is more than one beneficiary since the assets need to be sold so that proceeds of sale can be distributed.

Whitehouse and Hassall take the view that one situation where it may continue to be standard practice to use a trust for sale is in the residue clause of a will.¹⁴¹ They state that in cases where residue is to be divided amongst a number of beneficiaries, it will be necessary for the assets to be sold and the proceeds of sale then to be distributed and in such cases a trust for sale is obviously appropriate.¹⁴² Their conclusion is that, 'It is therefore thought that although trusts for sale are no longer necessary to deal with the problem of land which forms part of the residue, it will often remain the case that such a trust will remain part of any residue clause.'¹⁴³

On the other hand, the view of Wallington¹⁴⁴ is that an administration trust will not need to provide a trust for sale and will only need to provide that the testator's assets not otherwise disposed of are given to his executors/trustees to hold them on trust with power to sell them when the trustees think fit.¹⁴⁵ Wallington's opinion is that this

¹³⁸ Section 18 gives personal representatives with appropriate modifications the same rights and powers as trustees.

¹³⁹ *Op. cit.*, p. 59-60.

¹⁴⁰ *Op. cit.*, para. 4.12.

¹⁴¹ *Op. cit.*, para. 2.26 footnote 2.

¹⁴² *Op. cit.*, para. 6.41.

¹⁴³ The same view is expressed in *The Encyclopaedia of Forms and Precedents* (5th edn 2002 Reissue) by Lord Millett P.C. Vol. 40(2) para. 383 footnote 2 [3063].

¹⁴⁴ Richard Wallington *The Trusts of Land and Appointment of Trustees Bill* (1996) 146 N.L.J. 959 at 960.

¹⁴⁵ The Act will enable considerable simplification in the drafting of wills in 3 ways: first, an administration trust will not need to provide a trust for sale, since land will no longer be settled land under the Settled Land Act 1925 if no trust for sale is imposed; secondly, the powers conferred on trustees of land under section 6 will avoid the need for most of the extensive express powers which are currently needed in wills disposing of land; thirdly, it will be possible to simplify considerably the drafting of any clause intended to provide a residence for a beneficiary by leaving the statutory scheme in sections 12 and 13 to govern the beneficiary's rights of occupation (though section 11 may have to be excluded since it will add significantly to the burdens taken on by the trustees if not excluded).

will have the incidental effect that the rules in *Howe v. Dartmouth*¹⁴⁶ and *Re Chesterfield's Trusts*¹⁴⁷ will be excluded without further express provision (*Re Pitcairn*¹⁴⁸). Thus the rules in *Howe v. Dartmouth* and *Re Chesterfield's Trusts* can be excluded, or rather rendered inapplicable in the first place, by providing a discretionary power of sale over all residuary assets.¹⁴⁹ However, as Mitchell points out,¹⁵⁰ it is not merely the absence of an express duty to sell which has this result. What excludes *Howe v. Dartmouth* is the indication of intention that the time of sale should be within the trustees' discretion. Problems with this were demonstrated by *Re Hey's Settlement Trusts*¹⁵¹ which established good reason to avoid trusts for sale if at all possible.

Mitchell identifies 5 areas where he questions whether a trust for sale will help in relation to trustees' powers of sale.¹⁵² First, executors' powers of sale under the general law can be exercised only for the purpose of paying debts and legacies and may not extend to foreign property. This is resolved by conferring a general power of

¹⁴⁶ (1802) 7 Ves. 137. Where a will contains a residuary bequest of personal property to be enjoyed by persons in succession, unauthorised investments are held upon an implied trust to sell them and invest the proceeds in authorised investments unless the will reveals an intention that no sale is to take place. See Hayton and Marshall *Commentary and Cases on the Law of Trusts and Equitable Remedies* by David J. Hayton (11th edn 2001) paras. 9-182-9-184 and *Hanbury and Martin Modern Equity* by Jill E. Martin (16th edn 2001) p. 554-561.

¹⁴⁷ (1883) 24 Ch. D. 643. Where personalty which is subject to a duty to convert includes reversionary property or other non-income producing property, the mode of apportionment on sale or on the life tenant's death is done by ascertaining the sum which, put out at interest at 4 per cent per annum on the day of the testator's death, and accumulating at compound interest calculated with yearly rests and deducting income tax, would with the accumulations of interest, have produced, at the day of receipt, the amount actually received. The aggregate of the sums so ascertained must be treated as capital and the residue as income payable to the tenant for life. See Hayton and Marshall *op. cit.*, paras. 9-186-9-190 and *Hanbury and Martin op. cit.*, p. 557-558.

¹⁴⁸ [1896] 2 Ch. 199.

¹⁴⁹ See *Williams on Wills op. cit.*, para. 38.18 and footnote 4.

¹⁵⁰ Robert Mitchell *Trusts for Sale in Wills- Excess Baggage?* [1999] Conv. 84 at 99.

¹⁵¹ [1945] Ch. 294 where the testator specifically tried to exclude the rule in *Howe v. Dartmouth*, yet there was a resulting trust interest of which neither the testator nor his executors were aware. As residue was subject to a trust for sale with power to postpone, it was held that *Howe* should apply.

¹⁵² *Op. cit.*, p. 95-96. See also *Williams on Wills op. cit.*, para. 200.55 for analysis of why trusts for sale are generally no longer necessary. Para. 200.56 demonstrates three situations where a trust for sale might be appropriate. Paras. 214.1-214.2 discuss the recommendation that trusts for sale in administration trusts of residue are not provided but that there should be express provision of a power of sale if there is no provision of a trust for sale, even though there are wide powers conferred by sections 39 and 40 of the Administration of Estates Act 1925 and section 6(1) of the 1996 Act for the purposes of the administration. James Kessler *Drafting Trusts and Will Trusts A Modern Approach* (6th edn 2002) p. 25 adopts the view that, '... it is not necessary to use a trust for sale of land. It has never been necessary to use a trust for sale of personal property. These clauses can now be regarded as completely obsolete.'

sale exercisable whether or not any debts or legacies remain to be provided for and wherever the assets are situated. Secondly, there are small technical gaps in trustees' general power of sale but this is resolved by conferring a general power of sale. Both the first and second areas do not justify the continued use of a trust for sale. Thirdly, executors and trustees are subject to the right of an absolutely entitled beneficiary in appropriate cases to demand transfer of his share in kind. A trust for sale alone is not sufficient to deal with this problem but a trust for sale may give 'valuable cosmetic comfort to executors and trustees in resisting beneficiaries' demands for transfer in kind'.¹⁵³

Fourthly, trustees of land are subject to constraints arising from the statutory right of occupation. Mitchell's view is that a trust for sale is neither necessary nor sufficient to deal with rights to reside, but should rather be dealt with by a declaration by the testator that the land is not available for occupation. Mitchell's fifth area is that trustees of land are subject to judicial interference under section 14 of the 1996 Act. In this area lies a second possible cosmetic reason for the continued use of a trust for sale. A court is more likely to give weight to a trust for sale than a power to retain or sell.

Conclusion

The change from a trust for sale to a trust of land is not a momentous, pivotal reform and it is unfortunate that following the 1996 legislation, the law has not been reformed in a way which necessarily streamlines and simplifies it. Practitioners will still need to be aware of the possibilities and pitfalls of trusts for sale. The simple concept of the trust of land may not be the panacea that the Law Commission was hoping for. Certainty has not been bought by introducing seemingly simplified provisions. Section 4(1) should be drafted to omit the words 'and the trustees are not liable in any way for postponing sale of the land, in the exercise of their discretion, for an indefinite period.' Additionally, the trust of land should be a trust to retain with a power to sell in order to reflect the reality of the situation. This can be achieved by

¹⁵³ *Op. cit.*, p. 96.

means of a subsection added to section 6 imposing a duty to postpone the sale of land rather than a power in the case of a trust of land.

CHAPTER 4- HAS THE DOCTRINE OF CONVERSION BEEN ABOLISHED?

DO SOLICITORS THINK THAT THE ABOLITION OF THE DOCTRINE OF CONVERSION IS WORTHWHILE?

13 solicitors¹⁵⁴ stated that the abolition of the doctrine of conversion was worthwhile.

2 solicitors¹⁵⁵ stated that the abolition of the doctrine of conversion was not worthwhile.

2 solicitors¹⁵⁶ did not answer the question.

The vast majority of the solicitors interviewed recognised that the demise of the doctrine of conversion was long overdue, since solicitors had in any event disregarded the doctrine in recent years. This should be compared with the poignant comments, which represent the minority view, lamenting the loss of the doctrine by William Hancock (Speechly Bircham) who stated that, *'I am not happy with the abolition of the doctrine of conversion. For international tax and trusts work, it is sometimes useful to have concepts like the doctrine of conversion. Whether or not it should be useful in practice, it has been. E.g. if I have a client who is not domiciled in this country who wishes to set up a trust and let us assume the client is Italian, if the trust is of realty, then normally you would not be able to dispose of that property¹⁵⁷ because you look to the law of the home jurisdiction. If Italy does not recognise dispositions of property in trust by Italian domiciliaries,¹⁵⁸ then you have not effected a transfer of the property. There was a case called Re Piercy¹⁵⁹ in 1895 (it has been followed in subsequent tax cases) where North J. appeared to accept that because of the application of the doctrine of conversion, there was an effective trust. It is just an*

¹⁵⁴ Allen and Overy, Boodle Hatfield, Burges Salmon, Charles Russell, Eversheds, Farrer and Co, Linklaters and Alliance, Macfarlanes, May, May and Merrimans, Official Solicitor, Payne Hicks Beach, Wiggin and Co and Withers.

¹⁵⁵ Currey and Co and Speechly Bircham.

¹⁵⁶ Herbert Smith and Public Trust Office.

¹⁵⁷ On trust.

¹⁵⁸ Nowadays due to Italy's ratification of the Hague Convention on the Law Applicable to Trusts and on their Recognition 1985, Italians can create trusts of Italian immovables on valid 'trusts interni'. See Maurizio Lupoi *The Development of Protected Trust Structures in Italy* in *Extending the Boundaries of Trusts and Similar Ring-Fenced Funds* edited by David Hayton (2002) p. 85 at 92.

¹⁵⁹ [1895] 1 Ch. 83.

example, perhaps a rather obscure one, why I am not happy with academic changes in the law which are for the main part directed at helping conveyancers but have knock-on effects for practitioners in other areas connected with land and trusts.'

Recommendation for reform

The doctrine of conversion developed in the eighteenth century¹⁶⁰ and originated as an equitable doctrine under a trust for sale of land whereby as soon as a trust for sale came into operation, the interests of the beneficiaries under the trust became automatically interests in the proceeds of sale of the land¹⁶¹ and not in the land itself, since 'equity looks on that as done which ought to be done.'¹⁶² The doctrine of conversion also applied in reverse if money was being held by trustees under a duty to buy land, known as reverse conversion, whereby the interests of the beneficiaries became automatically interests in land.¹⁶³ The doctrine became important because before 1926, realty and personalty descended to different people on intestacy,¹⁶⁴ so it was viewed as wrong that the precise moment at which the trustees carried out their duty to sell or buy should determine whether the rights of beneficiaries were realty or personalty.

There is a view that the prolonged survival of the doctrine of conversion was probably because it was considered to have a role in the concept of overreaching, but it was never an essential element. The redundancy of conversion is demonstrated by the fact that it can now be removed without the edifice collapsing.¹⁶⁵ The abolition of the doctrine of conversion has not had any effect on overreaching on sale by two

¹⁶⁰ See Lightwood *op. cit.* p. 59ff. Stuart Anderson *The Proper Narrow Scope of Equitable Conversion in Land Law* (1984) 100 L.Q.R. 86 undertakes a thorough, detailed, historical analysis of the doctrine of conversion. In early case law conversion-logic rarely succeeded in applying where it was held that such interests should not be treated as personal property and that conversion-absolutism under which equitable interests were always treated as personal property was an invention of twentieth century commentators.

¹⁶¹ *Fletcher v. Ashburner* (1779) 1 Bro.C.C. 497, *Stevens v. Hutchinson* [1953] Ch. 299.

¹⁶² See e.g. *Lechmere v Earl of Carlisle* (1733) 3 P. Wms. 211 at 215, *Guidot v Guidot* (1745) 3 Atk. 254 at 256.

¹⁶³ *Re Scarth* (1879) 10 Ch. D. 499.

¹⁶⁴ Realty devolved on the heir (ascertained by virtue of the common law as amended by the Inheritance Act 1833) and personalty devolved on the next-of-kin (ascertained according to the Statute of Distribution 1670, as explained and amended by the Statute of Frauds 1677 and the Statute of Distribution 1685). Since 1925 realty and personalty have devolved in the same way on intestacy. The distinction will only be of importance today if a will specifically provides for land or realty to pass to one beneficiary and personalty to a different beneficiary.

¹⁶⁵ See Barraclough and Matthews *op. cit.*, para. 3.1.

trustees.¹⁶⁶ Conversion is not necessary to explain overreaching which is a view robustly held by Charles Harpum.¹⁶⁷

The Law Commission's recommendation was that 'the doctrine of conversion should be abolished in relation to all trusts, whenever created. The equitable interests of the beneficiaries will continue to be overreached if payment is made to two trustees, the interests becoming interests in the proceeds of sale if or when the land is sold. In this way the practical utility (in conveyancing terms) of the doctrine will remain undiminished.'¹⁶⁸ Clause 21 of the draft Bill was drafted differently from section 3 and was in fact better drafted than section 3.¹⁶⁹ Clause 21 stated that, 'In determining for any purpose whether property subject to a trust or held by personal representatives should be treated as personalty or realty, any duty of the trustees or the personal representatives to deal with that property so as to alter its nature in that respect shall be disregarded.' This clause did, however, sow the seeds of the problem which took root in section 3, because the draftsman was not thinking of the interests of the beneficiaries, but was thinking of the property in the hands of the trustees.

Problematic drafting of section 3?

Section 3(1) adopted a *prima facie* simpler and more straightforward formulation which is, in fact, highly problematic, since it states that, 'Where land is held by trustees subject to a trust for sale, the land is not to be regarded as personal property; and where personal property is subject to a trust for sale in order that the trustees may acquire land, the personal property is not to be regarded as land.' Both the preamble

¹⁶⁶ This misconception had its origin in an attractive but ultimately misleading thesis first promulgated by Lightwood *op. cit.*, p. 65: see Graham Ferris and Graham Battersby *The General Principles of Overreaching and the Reforms of 1925* (2002) 188 L.Q.R. 270 at 281 footnote 73.

¹⁶⁷ *Overreaching, Trustees' Powers and the Reform of the 1925 Legislation* [1990] C.L.J. 277 at 278-279. Harpum repeats his view more briefly in *Overreaching, Trusts of Land and Proprietary Estoppel* (2000) 116 L.Q.R. 341 at 343. Anderson *op. cit.*, p. 109 stated that we should drop 'the dogma conversion is, or once was, necessary to explain overreaching. That has never been true; nor could it ever have been true'. See also Charles Harpum *The Law Commission and the Reform of Land Law in Land Law Themes and Perspectives* edited by Susan Bright and John Dewar (1998) ch. 6 at p. 174, Ferris and Battersby *op. cit.*, p. 271 and *Birmingham Midshires Mortgage Services Ltd v. Sabherwal* (2000) 80 P. & C.R. 256 para. 22 per Robert Walker L.J upholding the reasoning of Lord Oliver in *City of London Building Society v. Flegg* [1988] A.C. 54 at 90.

¹⁶⁸ Law Com. No. 181 para. 3.6.

¹⁶⁹ The wording is wide enough to cover property held by personal representatives subject to an option to purchase.

to the Act and the heading of the section refer to the abolition of the doctrine of conversion, but section 3 does not actually state this.¹⁷⁰

A side- or headnote to a statutory provision is not part of the provision and has no legislative force.¹⁷¹ As Upjohn L.J. stated in *Stephens v. Cuckfield R.D.C.*,¹⁷² 'While the marginal note to a section cannot control the language used in the section, it is at least permissible to approach a consideration of [the section's] general purpose and the mischief at which it is aimed with the note in mind.'¹⁷³ A different view was taken by Lord Reid in *Chandler v. D.P.P.* where he stated that 'side-notes cannot be used as an aid to construction. They are mere catch-words...'¹⁷⁴ However, in the later case of *D.P.P. v. Schildkamp*,¹⁷⁵ Lord Reid suggested that the side-notes represent the intention of Parliament. The side-note will thus be of value as an aid to construction,¹⁷⁶ but the central question is whether section 3 has abolished the doctrine of conversion.

A further problematic aspect is the wording of section 3 itself. Section 3 states that, 'the land is not to be regarded as personal property' and 'the personal property is not to be regarded as land'. The problem with this is that it was only the beneficial interests in the land which were treated as personalty and not the land itself, and it was only the beneficial interests in the personal property which were treated as land and not the personalty itself. A literal interpretation of section 3, therefore, would render it otiose and ineffective leaving the doctrine of conversion intact in the state it had been prior to the passing of the Act. In addition, the terminology in section 3 that 'the land is not to be regarded as personal property' is too loose and inaccurate, since it seems to cover the trustee's interest which has never been converted. The section

¹⁷⁰ See generally Paul Matthews *Nice Try: Shame about Conversion* (1996/97) 5 P.T.P.R 87 and P.H. Pettit *Demise of Trusts for Sale and the Doctrine of Conversion?* *op. cit.*

¹⁷¹ See *Attorney-General v. Great Eastern Railway* (1879) 11 Ch. D. 449 at 461, *Nixon v. Attorney-General* [1930] 1 Ch. 566 at 593.

¹⁷² [1960] 2 Q.B. 373 at 383.

¹⁷³ See *Cross Statutory Interpretation* (3rd edn 1995) by John Bell and Sir George Engle p. 132.

¹⁷⁴ [1964] A.C. 736 at 789.

¹⁷⁵ [1971] A.C. 1 at 10.

¹⁷⁶ Charles Harpum *The Law Commission and the Reform of Land Law* *op. cit.*, p. 173 states that a side-note is necessarily conditioned by the long title of the Act, which states that its purpose is 'to make new provision about trusts of land including abolishing the doctrine of conversion'. He draws an analogy in footnote 164 with the side-note to section 6 'General powers of trustees' which nobody would suggest was concerned with anything other than the powers of trustees of land.

should rather have specifically referred to the beneficiary's interest. As Matthews said, 'it gives us little confidence that the draftsman really understood what he or she was doing here.'¹⁷⁷

Has section 3 abolished the doctrine of conversion?

Section 3 may not have abolished the doctrine itself; at best the draftsman may have negated the effects of conversion.¹⁷⁸ The draftsman should have named the doctrine and like the side-note, declared it to have been abolished. Alternatively, he could have set out the doctrine, 'then given it its quietus'¹⁷⁹ and stated it is abolished. There is little substantive difference between those two options, although the first is preferable, since the latter may give rise to disputes over interpretation of the exposition of the doctrine. What section 3 has done is to set out the doctrine and say that it is not to apply. The draftsman described what he or she thought to be the *effects* of the doctrine and then *reversed* those effects. This should have the effect of abolishing the doctrine, but demonstrates the deficiency in relying on the draftsman's interpretation of the doctrine.

Matthews concludes by saying that it would not have been difficult without abolishing conversion to provide that a beneficiary under a trust for sale of realty should be treated for the purposes of this Act as having an interest in land pending sale and similarly with personalty held on trust to acquire land.¹⁸⁰ In his view that would have led to the same substantive result as that intended by the Act. Yet this construction would have been a half-hearted attempt to deal with a problem which the Law Commission emphatically wanted dealt with by way of abolition of conversion in relation to all trusts whenever created.¹⁸¹

¹⁷⁷ *Op. cit.*, p. 91.

¹⁷⁸ See Matthews *op. cit.*, p. 90.

¹⁷⁹ Matthews gives as an example section 1(1) of the Law of Property (Miscellaneous Provisions) Act 1989. However, the difference with section 1(1) of the 1989 Act is that it did not abolish a doctrine but a rule of law which was never epitomised by way of a doctrine. Thus setting out the rule and abolishing it is easier than purporting to abolish a doctrine which is encapsulated by one word without using that word.

¹⁸⁰ *Op. cit.*, p. 94.

¹⁸¹ Law Com. No. 181 para 3.6.

Concerns as to whether the draftsman fully understood the implications of the drafting are also exemplified by reverse conversion which Matthews argues¹⁸² is not abolished and is alive and well and living in equity textbooks, since section 3(1) covers the sale of personal property so that trustees may acquire land. Matthews argues that reverse conversion is where money is given to trustees on trust to buy land and there is no trust for sale at all. The wording of section 3 is yet again unfortunate. However the wording can be distorted to cover reverse conversion by stretching the meaning of the words. Although infelicitous wording is used, strictly the money is exchanged so that land may be acquired and if money is held by trustees on trust to buy land where the land is to be held on an express trust for sale, it is within the realm of possibilities to state that the money is subject to a trust for sale so that section 3 will cover this situation.¹⁸³

Kenny and Kenny are more forthright.¹⁸⁴ Their view is that section 3 does not have the effect of abolishing the doctrine of conversion and rightly state that section 3 is intended to prevent the doctrine of conversion operating in the case of a trust for sale which was the intention of the Law Commission. It is thus partial abolition of the doctrine of conversion. They state that, 'It is not possible to compliment the proposers of this change for its sense or the draftsman for the wording. For the section to apply there must be a trust for sale. It has no application, therefore, to any implied, resulting or constructive trust because there is no trust for sale in respect of these In other cases where there was, before the Act, an implied trust for sale on the statutory trusts, these cases are now all trusts of land and the statutory trusts were abolished by the repeal of s.35 of the LPA 1925.' It is, however, uncontroversial that section 3 does not apply to implied, resulting or constructive trusts, since the doctrine never had any application in these situations, unless there was an implied trust for sale.

¹⁸² *Op. cit.*, p. 92.

¹⁸³ Harpum *The Law Commission and the Reform of Land Law op. cit.*, p. 173 maintains that on a purposive interpretation, Matthews' view is hard to maintain and even a literal interpretation points to the same result. Harpum asserts that since where personal property is sold to enable land to be purchased, it would defeat the section if, as soon as it had been converted into money, the doctrine of conversion then applied, a direction that money should be applied in the purchase of land is an *a fortiori* case.

¹⁸⁴ *Op. cit.*, p. 6.

More controversially Kenny and Kenny state that, ‘This does not, however, although it may have been intended by the draftsman so to do, have the effect that the interest of the beneficiary is necessarily an interest in land where land is held by the trustees. This will depend on the nature of the beneficiary’s interest.’¹⁸⁵ They explain that it will be necessary to examine the terms of the express trust to see if a particular interest is land or not.¹⁸⁶ If the interest of the beneficiary is an interest only in income, e.g. where the form of words is that the trustees ‘stand possessed of the income of the trust fund and the net rent and profits until sale upon the trusts declared’, the beneficiary does not have an interest in possession in land but only in the income of the trust fund.

Kenny and Kenny state that this is so notwithstanding the effect of section 3, since section 3 does not mean that the interest of the beneficiary is an interest in land- the interest is what it is stated to be; if it is only in income, it is only income.¹⁸⁷ The crux of their argument is that the land which may be the sole property in that fund is vested in the trustees and the rent of that land is paid to them by any tenant because they have the right to receive it. The trustees are in possession of the land and the beneficiaries of the fund.

Tax cases demonstrate that the views of Kenny and Kenny are misconceived. The House of Lords in *Baker v. Archer-Shee*¹⁸⁸ recognised the right to income as an equitable interest in possession¹⁸⁹ and this approach was followed in *Memec v. I.R.C.*¹⁹⁰ In addition the weakness of Kenny and Kenny’s argument is that it ignores the wording of section 3 itself. Section 3 has a broad scope: it applies where land is held by trustees subject to a trust for sale. Where the trustees stand possessed of the income of the trust fund and the net rents and profits until sale on trust, this still falls within the wording of section 3, since land is held by trustees subject to a trust for

¹⁸⁵ *Op. cit.*, p. 6.

¹⁸⁶ *Op. cit.* p. 16.

¹⁸⁷ An analogy is drawn with the tax case on interests in possession *Pearson v. I.R.C.* [1981] A.C. 753.

¹⁸⁸ [1927] A.C. 844.

¹⁸⁹ There has been much controversy over the nature of a beneficiary’s interest whether it is a right in rem or a right in personam. See D.W.M. Waters *The Nature of the Trust Beneficiary’s Interest* (1967) 45 Can.B.R. 219 and generally Hayton and Marshall *op. cit.*, paras. 1-49-1-54.

¹⁹⁰ [1996] S.T.C. 1336 at 1351 and on appeal [1998] S.T.C. 754 at 764.

sale. Under the wording of section 3 it is irrelevant if the interest of the beneficiary is an interest only in income.

For Kenny and Kenny to be correct in their analysis, section 3 would have to state ‘and where beneficiaries have an interest in possession in the land’ but without such a qualification, their analysis cannot be correct. If Kenny and Kenny are right, then the effect of section 3 as they interpret it is perverse and deviant. There can be no logic in the doctrine of conversion still applying where the trustees stand possessed of the income of the trust fund and the net rent and profits until sale upon the trusts declared. No judge could sensibly interpret section 3 in this way which would make a mockery of the reforms. The wording of the trust for sale if it is a trust of land should not make a difference. If Kenny and Kenny are wrong on this point as is likely, then section 3 will not abolish the doctrine of conversion, but it will prevent the doctrine of conversion operating in the case of a trust for sale as the beneficiary’s interest will be an interest in land whatever the wording of the express trust.

What does section 3 not encompass?

Contracts for the sale or purchase of land?

Pettit identifies three areas that section 3 does not cover.¹⁹¹ First, he states that it clearly does not cover conversion under a contract for the sale or purchase of realty. His argument is that from the moment a contract for the sale of land is entered into, the vendor becomes a trustee for the purchaser as a result of the doctrine of conversion;¹⁹² he is a trustee of land within the 1996 Act which in section 1(2)(a) expressly includes a constructive trustee; the vendor as constructive trustee does not hold the land on trust for sale; section 3 only applies where land is held by trustees

¹⁹¹ *Demise of Trusts for Sale and the Doctrine of Conversion? op. cit.*, p. 209-211.

¹⁹² This is based on equitable principles going back to *Lady Foliamb*’s case in 1651 cited in *Daire v. Beversham* (1661) Nels. 76: see the view of Pettit expressed in more detail in an earlier article *Conversion under a Contract for the Sale of Land* (1960) 24 Conv. 47 and in his book *Equity and the Law of Trusts* (9th edn 2001) p. 694-696. The law was restated by Vaisey J. in *Hillingdon Estates Co. v. Stonefield Estates Ltd* [1952] Ch. 627 at 631. This principle has been stated in many judgments: *Green v. Smith* (1738) 1 Atk. 572 per Lord Hardwicke, *Paine v. Meller* (1801) 6 Ves.Jnr. 349 per Lord Eldon, *Capel v. Girdler* (1804) 9 Ves.Jnr 509 per Grant M.R., *Wilson v. Clapham* (1819) 1 Jac. & W. 36 per Plumer M.R., *Shaw v. Foster* (1872) L.R. 5 H.L. 321 at 349 per Lord Cairns, *Phillips v. Silvester* (1872) 8 Ch.App. 173 per Lord Selborne, *Lysaght v. Edwards* (1876) 2 Ch. D. 499 at 507 per Jessel M.R., *Lockharts v. Bernard Rosen* [1922] 1 Ch. 433 at 438 per Astbury J., *Cumberland Consolidated Holdings Ltd v. Ireland* [1946] K.B. 264 at 269 per Lord Greene M.R.

subject to a trust for sale; accordingly there is still a conversion under a contract for the sale of land.

It is odd that Pettit includes contracts for the sale of land as an omission in what section 3 should be covering. Section 3 was neither designed nor drafted to cover contracts for the sale of land. The Law Commission specifically refers to abolishing the doctrine of conversion 'in relation to all trusts' and in the context of overreaching by payment to two trustees.¹⁹³ This raises the issue whether the basis of the relationship between vendor and purchaser after exchange of contracts is one of trusts or contract law. The constructive trust in its application to the vendor and the purchaser is as old as the law of trusts; its origin is to be found in the implied use which at the beginning of the sixteenth century was understood to arise in favour of B when A bargained and sold lands to B.¹⁹⁴

Yet, as Waters argues,¹⁹⁵ the constructive trust between vendor and purchaser is a current legal problem that should never have existed and is a superfluous concept in the sense that the vendor/purchaser relationship could always have been contained adequately within the law of contract; its existence has led to no conceptual development in the law of sale and has in fact created problems which otherwise would not have existed. His view¹⁹⁶ is that the essential futility of the trust analogy was masked by the fact that the concept was accepted; the questioning which should have concerned its essential validity became concerned with its mode of operation with the result that the basic problem of vendor/purchaser trust has been continually fought on the wrong issue. Waters' opinion is that the problem of the essential incompatibility between the position of the trustee and the vendor before completion is insoluble.

¹⁹³ Law Com. No. 181 para. 3.6. Clause 21 of the draft Bill was worded in such a way as to make it even clearer that it did not apply to contracts for the sale of land.

¹⁹⁴ See Donovan Waters *Constructive Trust- Vendor and Purchaser* (1961) 14 C.L.P. 76, William Searle Holdsworth *A History of English Law* (3rd edn 1945 reprinted 1966) Vol. IV p. 424 and *Irebey v. Gibone* (1579) Cary 82.

¹⁹⁵ *Constructive Trust- Vendor and Purchaser op cit.*, p. 76.

¹⁹⁶ *Ibid.*, p. 78.

This should be compared with the conclusion of Oakley,¹⁹⁷ who having considered Waters' arguments, concludes that constructive trust still provides an acceptable basis for the vendor and purchaser relationship on the basis that different anomalies might have resulted from basing the relationship entirely on the law of contract and that the courts have managed to apply the trust concept consistently to the different problems which have arisen.

The fact that this is an unusual trusteeship¹⁹⁸ has led Thompson to argue that it is misleading to describe it as a constructive trust and that it is better to regard it as *sui generis*.¹⁹⁹ This focuses the analysis on the central issue which is that the doctrine of conversion operates due to the availability of specific performance with the consequence that equity looks on that which ought to be done as already having been done, so that conversion will not operate where specific performance cannot be obtained.²⁰⁰ If a court will not order specific performance, then a trust will not arise and the equitable title will not pass.²⁰¹ If specific performance ceases to be available as a remedy, the trust relationship terminates.²⁰²

¹⁹⁷ A.J. Oakley *Constructive Trusts* (3rd edn 1997) p. 304-305.

¹⁹⁸ See Lord Cairns in *Shaw v. Foster op. cit.*, at 338. The vendor is entitled to remain in possession of the property until completion and acquires an equitable lien on the property for payment of the purchase price. He is entitled to receive and retain all income prior to completion and must discharge all outgoings. For more details, see Oakley *op. cit.*, p. 292-305.

¹⁹⁹ M.P. Thompson *Must a Purchaser Buy a Charred Ruin?* [1984] Conv. 43. See generally Thompson *Modern Land Law op. cit.*, p. 185-189 as to the unusual nature of the trusteeship and Hanbury and Martin *op. cit.*, p. 326-328.

²⁰⁰ *Holroyd v. Marshall* (1862) 10 H.L.C. 191 at 209-210 per Westbury L.C., *Howard v. Miller* [1915] A.C. 318 at 326 per Lord Parker, *Central Trust and Safe Deposit Company v. Snider* [1916] 1 A.C. 266 at 272 per Lord Parker, *Buckmaster v. Harrop* (1802) 7 Ves. 550 per Grant M.R. See *Lewin on Trusts* by John Mowbray, Lynton Tucker, Nicholas Le Poidevin and Edwin Simpson (17th edn 2000) para. 10-02 referring to *Broome v. Monck* (1805) 10 Ves. Jr. 597, *Re Thomas* (1886) 34 Ch. D. 166, *Ridout v. Fowler* [1904] 2 Ch. 93. See also Oakley *op. cit.*, p. 277ff. Waters *Constructive Trust- Vendor and Purchaser op. cit.*, p. 78 states that it is fairly clear that the basis of equitable conversion was founded in the availability of specific performance and refers to *Atcherley v. Vernon* (1725) 10 Mod. 518 where Lord Parker giving judgment appears to treat this statement as incontrovertible.

²⁰¹ This was demonstrated in *Warmington v. Miller* [1973] Q.B. 877 at 887 where Stamp L.J., discussing *Walsh v. Lonsdale* (1882) 21 Ch. D. 9 at 14, held that, 'The equitable interests which the intended lessee has under an agreement for a lease do not exist in vacuo, but arise because the intended lessee has an equitable right to specific performance of the agreement. But the intended lessee's equitable rights do not in general arise when that which is agreed to be done would not be ordered to be done.' This should be compared with the view of Simon Gardner *Equity, Estate Contracts and the Judicature Acts: Walsh v. Lonsdale Revisited* (1987) 7 O.J.L.S. 60.

²⁰² *Plews v. Samuel* [1904] 1 Ch. 464 at 468 per Kekewich J. and in the Privy Council case of *Central Trust and Safe Deposit Company v. Snider op. cit.*, at 272 per Lord Parker. See generally Thompson *Must a Purchaser Buy a Charred Ruin? op. cit.*, p. 45-48 criticising the decisions in *Gordon Hill Trust Ltd v. Segall* [1941] 2 All E.R. 379 and *Lake v. Bayliss* [1974] 1 W.L.R. 1073. See also the discussion by Oakley *op. cit.*, p. 290-292 of authorities which establish that non-completion of the contract, for

Thompson challenges²⁰³ the conventional wisdom that if the house is damaged or destroyed, the loss falls on the purchaser²⁰⁴ on the ground that this is based on the trust analysis which depends on specific performance being ordered. He contends that if the house in question has been badly damaged or destroyed, it is not clear that specific performance would be ordered and thus the loss should not fall on the purchaser. The Standard Conditions of Sale now remedy this problem²⁰⁵ by providing that the risk in the property remains with the vendor.

In addition Thompson regrets²⁰⁶ that as a result of the application of the doctrine of conversion in this context of contracts for sale, Mrs Carrick lost her home in *Lloyds Bank plc v. Carrick*²⁰⁷ on the ground that ‘there is nothing in it [*Lloyds Bank plc v. Rosset*²⁰⁸] to suggest that where there is a specifically enforceable contract the court is entitled to superimpose a further constructive trust on the vendor in favour of the purchaser over that which already exists in consequence of the contractual relationship.’²⁰⁹ Although the decision today would be different on the basis that due to section 2 of the Law of Property (Miscellaneous Provisions) Act 1989, there would have been no contract and the doctrine of conversion would not have operated,²¹⁰ the decision highlights the dangers that may still lurking from the remnants of the

whatever reason, after the doctrine of conversion has operated, does not affect the converted state of the subject-matter of the contract: *Curre v. Bowyer* (1818) 5 Beav. 6, *Re Blake* [1917] 1 Ch. 18, *Whittaker v. Whittaker* (1792) 4 Bro.C.C. 31, *Hudson v. Cook* (1872) 13 Eq. 417, *Rose v. Watson* (1864) 10 H.L.C. 672.

²⁰³ *Must a Purchaser Buy a Charred Ruin?* *op. cit.*, p. 48-50 and *Modern Land Law op. cit.*, p. 186-187.

²⁰⁴ Established in *Lysaght v. Edwards op. cit.*, at 507 per Jessel M.R.

²⁰⁵ Standard Condition 5.1.1 (4th edn 2003) provides that, ‘The seller will transfer the property in the same physical state as it was at the date of the contract (except for fair wear and tear), which means that the seller retains the risk until completion.’ The Law Commission in *Transfer of Land Risk of Damage after Contract for Sale* Law Com. No. 191 (1990) para. 3.12 decided that, ‘If it turns out that the use of those Conditions does not, contrary to our expectations, result in the substantial elimination of the problems which we identified earlier, we consider that this topic should again be examined.’

²⁰⁶ M.P. Thompson *The Widow’s Plight* [1996] Conv. 295. Thompson at 300 relies partly on Lord Westbury in *Rose v. Watson op. cit.*, at 678 to argue that the beneficial ownership that the purchaser acquires seems to be independent of the notional ownership acquired simply by entry into the contract of sale.

²⁰⁷ [1996] 4 All E.R. 630. The Court of Appeal held that Mrs Carrick’s estate contract was void against the bank on the ground that the Class C(iv) land charge under the Land Charges Act 1972 had not been registered as a land charge. For criticisms of the decision, see Patricia Ferguson *Estate Contracts, Constructive Trusts and the Land Charges Act* (1996) 112 L.Q.R. 549 and Mika Oldham *Estate Contracts, Constructive Trusts and Estoppels in Unregistered Land* [1997] C.L.J. 32.

²⁰⁸ [1991] A.C. 107, referring to the speech of Lord Bridge.

²⁰⁹ *Op. cit.*, p. 639 per Morritt L.J.

²¹⁰ See Morritt L.J. at 639 and Thompson *The Widow’s Plight op. cit.*, p. 301-302.

doctrine of conversion which may lead to unfortunate and questionable results and decisions.

Pettit, dealing with the first area outside section 3, points out that if there is still conversion under a contract for the sale of land, the anomalous rule in *Lawes v. Bennett*²¹¹ will presumably also continue to apply.²¹² This raises the question of whether one is dependent on the other. If they are independent of each other, then the question has to be analysed whether the doctrine of conversion will still apply under *Lawes v. Bennett*. In *Snell's Equity* an option to purchase land is under the heading of a contract for sale and is treated as an extension of the doctrine of conversion by contract of sale;²¹³ *Meagher, Gummow and Lehane* are of the view that conversion depending on an option to purchase comes under the general heading of settlements and wills;²¹⁴ yet in his book *Equity and the Law of Trusts* Pettit places an option to purchase under a separate heading from a contract for the sale of land thus giving it autonomous legitimacy.²¹⁵

Under the rule in *Lawes v. Bennett* if a testator in his will devised all his realty to A and bequeathed his personalty to B, and having granted X an option to purchase the land, died before X had exercised the option, the devise to A would be adeemed and the proceeds of sale would be payable to B, the land being treated for the purpose of devolution on death as devolving from the date of the exercise of the option as proceeds for sale and not as real estate.²¹⁶ It made no difference that the option was not even exercisable until after T's death.²¹⁷

It was made clear in several cases²¹⁸ that conversion does not take place at the date when the option is granted but only when it is exercised so that A would get an estate

²¹¹ (1785) 1 Cox Eq.Cas. 167.

²¹² *Demise of Trusts for Sale and the Doctrine of Conversion?* *op. cit.*, p. 210.

²¹³ (30th edn 2000) by John McGhee para. 30-10.

²¹⁴ *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (4th edn 2002) by R.P. Meagher, J.D. Heydon and M.J. Leeming paras. 38-060-38-075.

²¹⁵ *Op. cit.*, p. 696-697.

²¹⁶ See Pettit *Equity and the Law of Trusts op. cit.*, p. 696.

²¹⁷ See *Re Isaacs* [1894] 3 Ch. 506 where the rule was applied on intestacy before 1926 between the heir-at-law and the next of kin.

²¹⁸ *Re Isaacs*, *Re Marlay* [1915] 2 Ch. 264, *Re Carrington* [1932] 1 Ch. 1.

defeasible by the exercise of the option, upon which event and not before conversion would take place.²¹⁹ The only case in which the proceeds do not descend as personalty is where there is a specific devise made subsequently to the creation of the option in which case the devisee obtains the proceeds if the option to purchase is exercised after the death of the testator, the principle being that where the testator, knowing of the existence of the option, devises a specific property notwithstanding the option to purchase,²²⁰ he indicates an intention that the devisee should have all the interest therein, whether the property or the purchase money.²²¹

The doctrine of conversion under *Lawes v. Bennett* will not be extended further due to its anomalous character²²² and it will only be applied to claims between people entitled to the real and personal property of a deceased grantor of an option.²²³ It was, however, applied by the Court of Appeal in *Re Carrington* where a specific legacy of shares was adeemed.²²⁴

The question remains whether the doctrine of conversion will still apply under *Lawes v. Bennett*. Section 3 was drafted with *inter vivos* trusts in mind; yet section 23(2) which refers for definitions to section 205(1)(xxix) of the Law of Property Act 1925 shows that trustees for sale include personal representatives in the definition of trustees for sale, thus giving section 3 wider application than might *prima facie* be realised. Under the will, when an option to purchase is exercised, the personal representatives hold the land subject to a trust for sale. If there is the judicial inclination, then the wording of section 3 can be interpreted widely on a purposive construction, though admittedly it is stretching section 3 beyond that which was contemplated due to the complex technicalities bound up in the doctrine of

²¹⁹ This means that any rents and profits which accrue between the date of death and the exercise of the option would go to A and not B. If there is conversion it seems to make no difference that the contract is not carried through to completion: *Re Blake*.

²²⁰ See *Meagher, Gummow and Lehane op. cit.*, para. 38-060.

²²¹ See *Page Wood V.-C.* in *Weeding v. Weeding* (1861) 1 John & H. 424 at 431.

²²² See *Pettit Equity and the Law of Trusts op. cit.*, p. 697.

²²³ It was not applied in *Edwards v. West* (1878) 7 Ch. D. 858 between a vendor and purchaser.

²²⁴ This decision has been attacked by H.G. Hanbury in *Notes* (1933) 49 L.Q.R. 173 on the basis that the decision was an unwarrantable extension of the *Lawes v. Bennett* doctrine because the doctrine of conversion proper is concerned with conversion from real into personal property and vice versa and not with the mere change from one kind of personalty into another. It has been followed since in a first instance decision *Re Rose* [1949] Ch. 78: see *Pettit Equity and the Law of Trusts op. cit.*, p. 697.

conversion. The only admitted case of conversion of any kind which has a retrospective effect arising from the rule in *Lawes v. Bennett* demonstrates the shortfalls in the drafting of section 3.

Order of the Court?

The second area that Pettit identifies in his article *Demise of Trusts for Sale and the Doctrine of Conversion?*²²⁵ is conversion under an order of the court. If the court by an order directs the sale or purchase of realty, it operates as a conversion from the date of the order.²²⁶ *Snell's Equity* states that conversion would only apply where a court orders a sale of realty in which two or more persons are interested and one dies before the sale takes place, his interest being part of his personalty and not of his realty.²²⁷ Pettit states that the courts have treated this in its effect as analogous to the situation where there is a trust for sale but it is not a trust for sale and would not appear to come within section 3. The reasoning behind this argument is that the order in itself amounts to the conversion quoting Kay J. in *Hyett v. Mekin*²²⁸ and reaffirmed by the Court of Appeal in *Burgess v. Booth*.

It is, however, splitting hairs to state that the court order amounts to conversion and that there is no trust for sale, since it is the wording of the court order which brings conversion into effect. If there were no words in the court order, there would be no conversion. If there is a trust, which there necessarily will be, and the court orders sale, there is *ipso facto* a trust for sale which merges with the court order so that they are one entity to bring about conversion.

As if almost realising this, Pettit qualifies what he has previously already said by differentiating between an absolute trust for sale and a trust for sale ordered by the

²²⁵ *Op. cit.*, p. 210.

²²⁶ *Steed v. Preece* (1874) L.R. 18 Eq. 192, *Hyett v. Mekin* (1884) 25 Ch. D. 735, *Burgess v. Booth* [1908] 2 Ch. 648, *Fauntleroy v. Beebe* [1911] 2 Ch. 257, *Re Silva* [1929] 2 Ch. 198, *Re Dodson* [1908] 2 Ch. 638. There are exceptions in statutory provisions such as the Mental Health Act 1983 section 101. In addition the court has power when ordering a sale or purchase of realty to provide that the change in the nature of the property shall not affect its devolution on death: *Attorney-General v. Marquis of Ailesbury* (1887) 12 App.Cas. 672, *Re Searle* [1912] 2 Ch. 365.

²²⁷ *Op. cit.*, para. 30-09.

²²⁸ *Op. cit.*, p. 742 where Kay J. said, '... if in an action for administration of an estate the Court in the exercise of its undoubted jurisdiction makes an order for the sale of the estate, the order for sale will amount in itself to a conversion.'

court. This is an erroneous distinction to draw and one which cannot be justified even in view of section 3. The term absolute adds nothing to the term trust for sale and the term trust for sale covers a trust for sale ordered by the court. Conversion under section 3 could actually have undesirable consequences where trustees have no authority to buy land, only authority to buy personal property, and they act *ultra vires* by purchasing land. Conversion would operate and section 3 states that the land is not to be regarded as personal property which totally frustrates the settlor's intention. This is one situation where it would be convenient if the personalty could remain personalty.

Partnership land?

The third area that Pettit identifies in his article is partnership land, though by his own admission, the position is now unclear.²²⁹ Section 22 of the Partnership Act 1890 provided that real property belonging to partners is, subject to the expression of a contrary intention, to be treated as personalty and not realty.²³⁰ The reason was that on dissolution of the partnership the land would have to be sold and the proceeds of sale divided among the partners. Section 22 is repealed by Schedule 4 of the 1996 Act.

Pettit postulates two possibilities as to the effect of the repeal. The first is that partnership land is no longer subject to a trust for sale, but is held by the partners as land under a trust of land. This has to be the correct interpretation. Pettit does not spell it out, but this means that section 3 has no application to partnership land and was not meant to. Simply stated, the effect of the repeal of section 22 is that there is no conversion where real property belongs to partners and section 3 of the 1996 Act is irrelevant.

²²⁹ *Demise of Trusts for Sale and the Doctrine of Conversion? op. cit.*, p. 210-211. One oddity which Matthews points out *op. cit.*, p. 92 is that as a result of the repeal of section 22 of the Partnership Act 1890, partnership interests in realty are now realty instead of personalty, so options to take up partnership in a firm owning realty will become subject to the Perpetuities and Accumulations Act 1964 section 9(2) and must be exercised within 21 years. This is unlikely to be problematic in practice.

²³⁰ Section 22 states that, 'Where land or any heritable interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners (including the representatives of a deceased partner), and also as between the heirs of a deceased partner and his executors or administrators, as personal or moveable and not real or heritable estate.'

Pettit's second possibility is more ingenious. His argument is that there was an equitable rule existing prior to the Partnership Act 1890 that real property belonging to partners was regarded in equity as personalty and that there is no reason why the pre-Partnership Act equitable rule should not continue to apply. He analyses the basis of the equitable rule and argues that the choice between which of the two views is correct depends on what is held to be the basis of the equitable rule. If the basis of the equitable rule is implied contract, the first possibility will apply so that the land will be held under a trust of land, there will be no conversion and section 3 will not be applicable.²³¹

If the basis of the equitable rule is an implied trust for sale, Pettit states that if partnership property is treated as subject to an implied trust for sale, there would be a trust of land within the 1996 Act and section 3 would apply. Pettit repeats in his book²³² that only in the case where the rule is based on an implied trust for sale would section 3 of the 1996 Act apply to prevent the operation of the doctrine of conversion. In *Attorney-General v. Hubbuck*²³³ Bowen L.J. explains the reason for conversion that partnership property is personal property, because it is an established principle in equity that when money is directed or agreed to be turned into land, or land agreed or directed to be turned into money, equity will treat that which is agreed to be, or which ought to be, done as done already.

The real question to be analysed is what happened to the pre-existing equitable rule on the repeal of section 22 of the Partnership Act? Section 22 was a re-enactment of the rule of equity²³⁴ and the rule of equity merged with the statutory provision. The equitable rule set out in cases prior to 1890 was not modified or altered by section 22; it was merely consolidated. It would be absurd if the rule remained in force when section 22 has been repealed. Yet section 16(1)(a) of the Interpretation Act 1978 does not apply as the equitable rule is in force and existing at the time at which the repeal

²³¹ Pettit derives this from *Darby v. Darby* (1853) 3 Drew 495 per Sir R.T. Kindersley V.-C. at 505, 506.

²³² *Equity and the Law of Trusts op. cit.*, at p. 697.

²³³ (1884) 13 Q.B.D. 275 at 289.

²³⁴ See *Phillips v. Phillips* (1832) 1 My & K 649, *Crawshaw v. Maule* (1818) 1 Swan 495, *Attorney-General v. Hubbuck*, *Darby v. Darby*.

takes effect. *A fortiori* the repeal will not revive anything in force or existing at the time when the repeal takes effect.

The only judicious interpretation is that the repeal of section 22 has swept away the amalgamated equitable rule at the same time, otherwise the repeal of section 22 would be futile. The equitable rule cannot, in any case, have independent validity for the reason stated previously, that after 1996 the existence of the trust of land signifies that there is no place for the equitable rule that equity regards as done that which ought to be done in the absence of an express trust for sale. Yet, strangely, Pettit takes the view that there is no reason why the pre-Partnership Act equitable rule should not continue to apply for the rationale for it remains valid. There is no justification for saying that the rationale remains valid, because the pre-existing rule was based on there being a trust for sale in the context of which conversion operated. The only situation where the rationale remains valid is where there is an express trust for sale which will be dealt with by section 3. The conclusion on partnership property is that section 3 will apply where there is a trust for sale in the partnership agreement.

Inconsistency between will trusts and inter vivos trusts created before 1997

Section 3(2) states that, 'Subsection (1) does not apply to a trust created by a will if the testator died before the commencement of this Act.' This leads to inconsistencies arising between will trusts and *inter vivos* trusts created before January 1st 1997. As Matthews himself says,²³⁵ if this were not so, then the Act would not affect existing *inter vivos* trusts arising through the operation of sections 34 and 36 of the Law of Property Act 1925. Yet there is justification for arguing that section 3(2) should have allowed an exception for *inter vivos* express trusts as well as trusts created by the will of a testator.

The rationale behind section 3(2) as it stands is that there is an exception for will trusts because it cannot be right to change the nature of a beneficiary's interest once it had vested.²³⁶ Yet the same is indubitably true of *inter vivos* express trusts.

Theoretically this could lead to absurdities. If a testator died in 1996 leaving on trust

²³⁵ *Op. cit.*, p. 92-93.

²³⁶ See Matthews *op. cit.*, p. 92.

for sale realty to A and personalty to B, then the 1996 Act would have no effect on this. Yet if an express *inter vivos* trust for sale in 1996 provided that the land of the trust was to be held for A and the personal property for B, section 3 of the 1996 Act would apply and after January 1st 1997, A would be entitled to the land and B to the personalty, whereas on December 31st 1996 under this express trust for sale, A was entitled to personalty and B to realty. If A and B were *sui iuris* and entitled under the rule in *Saunders v. Vautier*²³⁷ to call for the trust property, it is odd that with a day's difference, they would be entitled to different property.

Legislation is here interfering with beneficiaries' interests once they have vested. If a vested right has been taken away and no compensation provided, there may be a breach of Article 1 of the First Protocol of the European Convention on Human Rights, which has been incorporated into English law by the Human Rights Act 1998 and which provides that, 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No-one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and the general principles of international law.' The sub-section could be declared incompatible with Convention Rights under section 4 of the 1998 Act which does not affect the validity of the provision, but will almost certainly prompt legislative change. Due to the way trusts are worded nowadays, these problems are theoretical rather than practical.

Modern judicial perspective on conversion

A refreshingly modern and realistic approach was taken in 2002 in *Race v. Race*.²³⁸ The issue in this case was whether the gift to the defendant of a half share in residue which included the testator's interest in a public house had been adeemed by a subsequent lifetime gift of half of his interest in the public house to the defendant. Behrens J.'s pragmatic stance led to his conclusion²³⁹ that there is now no rule of law that the rule against double portions does not apply to land and that the rule did apply in this case with the consequence that the gift was adeemed.

²³⁷ (1841) Beav. 115, affirmed Cr. & Ph. 240.

²³⁸ [2002] E.W.H.C. 1868, Lawtel 9 July 2002.

²³⁹ *Ibid.*, para. 36.

The relevance of this case to the doctrine of conversion is based on statements of Behrens J. in which he explained that, 'It is difficult to see, as a matter of principle why there should be any distinction in the twenty-first century between gifts of realty and gifts of personalty. The rule against double portions²⁴⁰ is based on the presumed intention of the donor. It is difficult to see why he should now be presumed to have a different intention as between realty and personalty. That difficulty is increased when one considers the effect of TLATA. It seems odd that the presumed intention of Wilfred Race should depend on the coming into force of an Act of which he probably had no knowledge and certainly had no interest.'²⁴¹ The significance of these comments is that they are indicative of the perspective likely to be taken by the judiciary in relation to the doctrine of conversion which is to treat the doctrine of conversion as inapplicable and irrelevant to the modern era.

Conclusion

One desirable consequence of abolishing the doctrine of conversion is that there will be no difference between the interests of beneficiaries under a trust for sale and those under a trust of land. Uniformity is beneficial and necessary if the 1996 Act is to achieve its underlying goals. It would defeat what coherent strategy there is in the Act if beneficiaries under different types of trust were to hold different types of interest. Yet what is increasingly apparent is that the doctrine of conversion is far more complex than the drafters of the statute realised, since section 3 has its roots deep in history, leaving open the question whether the doctrine of conversion has categorically been abolished and in what areas the doctrine still survives. Section 3(1) is the most badly drafted subsection of the Statute and should state that the doctrine of conversion is hereby abolished in respect of realty held on trust for sale and personalty held on trust for sale to acquire realty, so that the section and the heading of the section would be the same.

²⁴⁰ This is the rule that the donor did not intend to give two portions to the same donee.

²⁴¹ *Op. cit.*, para. 27.

CHAPTER 5- CAN ENTAILED INTERESTS STILL BE CREATED?

HAVE SOLICITORS' CLIENTS BEEN AFFECTED BY THE PROHIBITION ON THE CREATION OF NEW ENTAILED INTERESTS?

5 solicitors²⁴² stated that their clients had been affected by the prohibition on the creation of new entailed interests.

12 solicitors²⁴³ stated that their clients had not been affected by the prohibition on the creation of new entailed interests.

It was unexpected that such a large minority of those firms would be affected in this way. William Hancock (Speechly Bircham) typified the minority view when he stated that, *'Clients believe in land passed on to them by their father and grandfather and they want to see a trust deed that land is to continue in the family. You can endeavour to recreate an entailed interest by creating trusts that confer a series of life interests but you do run against a perpetuity problem in the end because you cannot confer a vested interest in someone who is not in being.'*

Chris Jarman (Payne Hicks Beach) stressed the tax advantages of creating entailed interests when he explained that, *'Prohibition is most inconvenient from the point of view of tax planning. There are occasions when you want to make someone as near absolutely entitled as you can under an existing trust without doing that absolutely and an entailed interest represented quite a useful way of doing that. Now we have to look for other structures.'*

A strong sense of tradition amongst traditional landed families wishing to cling to the old rules of descent emerged from these responses and the sense of loss and frustration at the need to adapt to changed circumstances was blatant amongst this minority who fervently resented the restrictions imposed by the new legislation.

²⁴² Charles Russell, Currey and Co, Payne Hicks Beach, Speechly Bircham and Withers.

²⁴³ Allen and Overy, Boodle Hatfield, Burges Salmon, Eversheds, Farrer and Co, Herbert Smith, Linklaters and Alliance, Macfarlanes, May, May and Merrimans, Public Trust Office, Official Solicitor and Wiggin and Co.

Paragraph 5 of Schedule 1

Paragraph 5 of Schedule 1 of the 1996 Act is an example of deficient, inappropriate, inept and incongruous drafting. It states that, '(1) Where a person purports by an instrument coming into operation after the commencement of this Act to grant to another person an entailed interest in real or personal property, the instrument- (a) is not effective to grant an entailed interest, but (b) operates instead as a declaration that the property is held in trust absolutely for the person to whom an entailed interest in the property was purportedly granted.' The following four propositions are contended here.²⁴⁴ First, the paragraph is not worded so as to fulfil the Law Commission's aims. Secondly, the repeal of section 130(1) and (2) of the Law of Property Act 1925 now enables the creation of entailed interests in certain limited and specified circumstances. Thirdly, the repeal of section 130(1) and (2) revives the rule in *Wild's Case*.²⁴⁵ Fourthly, contrary to the view stated in a recent article,²⁴⁶ the doctrine of *cy-près* has not survived the 1996 Act.

Were the Law Commission's aims fulfilled?

The Law Commission proposed explicitly that, 'Given that our recommendations are designed to minimise use of the Settled Land Act 1925, it seems logical to suggest that there should be no new entails, particularly as the latter would have little purpose outwith the framework of a strict settlement.'²⁴⁷ In the interests of freedom of choice, entailed interests could have been preserved for use in a trust of land for those landed families whose priority was for land to pass with a title. The Law Commission continued, 'We recommend that an attempt to create an entailed interest in land should operate as a grant of a fee simple absolute, unless the grantor has an equitable interest only. In this latter case, the attempt to create an entail will take effect as a declaration of trust on the part of the settlor or the personal representative that the land is held on trust (under the new system) for the grantee absolutely.'

²⁴⁴ See Susan Pascoe *Solicitors: Be Bold- Create Entailed Interests* [2001] Conv. 396.

²⁴⁵ (1599) 6 Co. Rep. 16b.

²⁴⁶ Elise Bennett Histed *Finally Barring the Entail* (2000) 116 L.Q.R. 445.

²⁴⁷ Law Com. No. 181 para. 16.1. The Law Commission was of the erroneous view that, 'At present, entailed interests can only be constituted behind a strict settlement.' See also Whitehouse and Hassall *op. cit.*, para. 6.28.

The Law Commission would not allow freedom of choice to remain for personalty since it recommended that, ‘Given that we are concerned to approximate the positions of trusts of real and personal property, we further recommend that it should no longer be possible to create entailed interests in personal property.’ Whitehouse and Hassall state that, ‘The authors (contrary to the findings of the Law Commission) have encountered entailed interests (of chattels) behind a trust for sale. For a titled family desirous of ensuring that the “family treasures” are kept in the male line (together with the title), an entailed interest offers the most appropriate vehicle. The passing of such interests is to be lamented.’²⁴⁸ The lamentations for the entailed interest appear to be more widespread than was originally anticipated.

This was not the view taken by Mr Lawrence Collins Q.C. sitting as a Deputy Judge in the Chancery Division in the year 2000 in *D’Abo v. Paget (No. 1)*.²⁴⁹ He gave a brief historical overview of strict settlements and entails and stated *obiter* that even since 1925, entails ‘were not of great importance, and they had become obsolete before they were abolished by the Trusts of Land and Appointment of Trustees Act 1996: see Megarry & Wade, 6th ed. p.52.’²⁵⁰ This statement is too wide. What Megarry and Wade actually said was that, ‘Entails became virtually obsolete’²⁵¹ and footnote 34 recognised that, ‘It appears that they were still sometimes created in certain parts of the country, notably in the north east of England.’ The case turned on the wording of clause 7²⁵² and was therefore one of construction and is not of great importance on the issue of entails other than to manifest a judicial perspective on entails.

²⁴⁸ *Op. cit.*, para. 6.30.

²⁴⁹ [2000] W.T.L.R. 863, Lawtel 10 July 2000.

²⁵⁰ *Ibid.*, para. 15.

²⁵¹ *Op. cit.*, para. 3-037.

²⁵² Clause 7 stated that the property was held on trust for Michael William Vernon Maude for life and after his death ‘as to both capital and income absolutely for the child or other issue..... who if the devolution of the said property had been subject to limitations in strict settlement in favour of the said and his issue would on the death of Michael William Vernon Maude first have become entitled as tenant in tail in possession to the said property.’ Mr Lawrence Collins Q.C. held that the will should be construed to the daughters successively and not concurrently as tenants in common with the result that the trustees held the property on trust for the eldest daughter absolutely.

Clause 16 of the draft Bill annexed to the Law Commission Report contained different wording from paragraph 5 of Schedule 1 of the 1996 Act.²⁵³ The wording of clause 16(2) is worthy of analysis, since it laid the foundation stones for the problematic wording of paragraph 5 of Schedule 1. It provided that, ‘Where such an instrument contains an expression showing an intention to create an entailed interest in either real or personal property then (a) if it purports to grant any person a legal interest in tail, it shall operate instead to transfer the property to him absolutely; and (b) if it purports to grant any person an equitable interest in tail, it shall operate instead as a declaration that the property is held in trust for him absolutely.’ This should be contrasted with the wording in paragraph 5 of Schedule 1. In its Working Paper the Law Commission originally proposed,²⁵⁴ in addition to forbidding the creation of new entailed interests, to convert all existing entails into fee tail estates but this proposal disappeared without any explanation from the final report.

Purports- broad or narrow meaning?

The use of ‘purports’ in paragraph 5 is enigmatic. The paragraph is saying that the effect spelt out only applies when one *purports* to grant to another an entailed interest, rather than actually grants it. If the creation of entailed interests had been prohibited after the commencement of the Act, then the wording would have the desired effect. There is, however, no clear provision stating that entailed interests cannot be created after the commencement of the Act.²⁵⁵ The repeal of section 130(1) to (3) and (6)²⁵⁶ does not have that effect as will be discussed later. Its use in the original clause 16 is understandable and justifiable and is used in a different context. That clause applies ‘where such an instrument contains an expression showing an intention to create an entailed interest....’, whereas paragraph 5 only applies ‘where a person purports to

²⁵³ Clause 16(1) stated that, ‘Section 130(1) to (3) shall not apply to any instrument taking effect after the commencement of this Act.’ Clause 16 did not refer to section 130(6).

²⁵⁴ Law Com. Working Paper No. 94 para. 6.8. See also Roger Sexton *The Law Commission’s report on trusts of land, at last a law for contemporary society?* [1989] Trust L. & P. 66 at 70.

²⁵⁵ Compare section 2(1) of the 1996 Act dealing with strict settlements which puts the matter beyond doubt.

²⁵⁶ It should be noted that clause 16 of the Law Commission’s draft Bill did not repeal section 130 but stated that section 130(1) to (3) shall not apply and left it to Schedule 2 to repeal section 130(6), whereas paragraph 5 of the 1996 Act does not deal with section 130 and leaves it to section 25(2) and Schedule 4 to repeal subsections (1) to (3) and (6) and the words ‘Creation of’ in the sidenote.

grant to another an entailed interest....'. They apply in completely different circumstances and cannot have the same effect.

The reason 'purports' was used in clause 16(2)(a) is that after 1925 it was no longer possible to create a legal interest in tail, since such interests necessarily had to be equitable due to section 1(1) to (3) of the Law of Property Act 1925. The use of 'purports' in clause 16(2)(b) is questionable, since it was possible to create equitable interests after 1925 and is used either to be consistent with (a) or due to a misunderstanding of the effects of repealing parts of section 130. If the narrow meaning of 'purports' is adopted, as it is in its usual sense, it is used in common parlance to mean when one tries to do something but does not succeed. If one actually does succeed at something, one is not purporting to do it. This means that paragraph 5 only applies where one tries to create an entailed interest but fails to do so.²⁵⁷

How can one try to create an entailed interest but fail to do so? Before 1 January 1882 the words of limitation necessary to create an entailed interest by deed were 'heirs'²⁵⁸ and 'of his body'²⁵⁹ and if these were not used, a life estate was conferred on the grantee.²⁶⁰ However, section 51 of the Conveyancing Act 1881 provided that in deeds executed after that date, it should be sufficient to use the words 'in tail' instead of 'heirs of the body'. Less formal language would create an entailed interest in a will²⁶¹ and executory instrument such as marriage articles. However, section 130(1) of the Law of Property Act 1925 extended the strict requirements of the common law applicable to deeds to wills and therefore in both wills and deeds after 1925 specific wording 'to A in tail' or 'to A and the heirs of his body' was required. This means

²⁵⁷ This idea was first suggested by Kenny and Kenny *op. cit.*, p. 33.

²⁵⁸ And not expressions like seed, offspring, descendants, issue etc.

²⁵⁹ See Kenny and Kenny *op. cit.*, p. 33. This was to indicate that the inheritance was to pass to the direct descendants (though other expressions were sufficient such as 'of his flesh' and 'from his proceeding' etc.).

²⁶⁰ See Cheshire and Burn *op. cit.*, p. 276-278 and Megarry and Wade *op. cit.*, paras. 3-033-3-034.

²⁶¹ Any expressions that indicated an intention to give the devisee an estate of inheritance, descendible to his lineal as distinct from his collateral heirs, conferred an entailed interest e.g. devises to A and his seed, A and his offspring, A and his family according to seniority, A and his issue, A and his posterity: see Cheshire and Burn *op. cit.*, p. 277.

that paragraph 5 can be strictly construed to apply only to cases where the appropriate wording to create an entailed interest is not used.²⁶²

The broad meaning of ‘purports’ is to signify or imply. This will give paragraph 5 the meaning intended by the Law Commission and is supported by *Joseph v. Joseph*²⁶³ where Lord Denning M.R. stated that, ‘The word “purports” does not mean “professes”. It means “has the effect of”.’ Russell L.J. said, ‘For my part I would not give a narrow construction to that phrase in this context: one meaning I take to be “to have as its effect”, and this seems to be a suitable meaning when the statute is avoiding an agreement and, therefore, is presumably aimed at its effect.’²⁶⁴ This throws a totally different light onto the interpretation of ‘purports’ and was in the context of section 38(1) of the Landlord and Tenant Act 1954 which provides that any agreement relating to a tenancy under Part II of the Act shall be void in so far as it purports to preclude the tenant from making an application or request under the Act.

The context of the 1954 Act is different from the context in paragraph 5 of the 1996 Act and ‘purports’ should not take the wider meaning in the 1996 Act. However a court will look at the Law Commission’s Report following the House of Lords decision in *Pepper v. Hart*²⁶⁵ and applying a purposive approach to construction, will no doubt take a broad view of ‘purports’ and give it a wide meaning. If a judge considers that the application of words in their grammatical and ordinary sense would produce a result which is contrary to the purpose of the statute, he may apply them in any secondary meaning which they are capable of bearing.²⁶⁶

²⁶² Kenny and Kenny *op. cit.*, p. 33 offer alternative suggestions as well. First, they suggest that the literal interpretation could be grants where only the word ‘entail’ is used, but this is an unlikely construction and stretches the construction of the paragraph too far. Secondly, they suggest that it should be read with the following meaning, ‘where the purport of any grant might be to create an entailed interest then para. (1)(b) takes effect’ which is an unwarranted re-drafting of the paragraph.

²⁶³ [1966] 3 All E.R. 486. See John B. Saunders *Words and Phrases Legally Defined* (3rd edn 1989) Vol. 3: K-Q.

²⁶⁴ *Op. cit.*, p. 493.

²⁶⁵ [1993] 1 All E.R. 42.

²⁶⁶ See Cross *op. cit.*, p. 81-92, *Pinner v. Everett* [1969] 3 All E.R. 257 at 258 per Lord Reid, *Maunsell v. Olins* [1975] A.C. 373 at 391 per Lord Simon of Glaisdale.

Need for an Instrument

Can entailed interests be created orally or by a form of writing that is not an instrument? Section 130(6) of the Law of Property Act 1925 states that, ‘An entailed interest shall only be capable of being created by a settlement of real or personal property or the proceeds of sale thereof...’ Settlement is not defined in the Law of Property Act 1925, but section 117(1)(xxiv) of the Settled Land Act 1925 states that, “‘settlement’ *includes*²⁶⁷ an instrument or instruments which under this Act or the Acts which it replaces is or are deemed to be or which together constitute a settlement’ This definition is circular and unhelpful, because it is not a comprehensive definition of settlements and the definition of instrument in section 117(1)(viii) does not facilitate an answer, since it merely states that it ‘does not include a statute unless the statute creates a settlement.’ The same formalities applied to entailed interests in personal property as to real property²⁶⁸ which meant that section 53(1)(a) or (b) of the Law of Property Act 1925 had to be satisfied for both. This meant that there had to be writing signed by the person creating the interest or declaring the trust.

The question arises whether this is the same as an instrument. *Stroud’s Judicial Dictionary of Words and Phrases*²⁶⁹ defines instrument as ‘a writing, and generally imports a document of a formal legal kind’. The use of the word ‘generally’ allows room for manipulation to allow an informal document into the definition. Section 130(6) has now been repealed.²⁷⁰ Consequently, is a rough piece of paper written by a settlor informally creating an entailed interest caught by paragraph 5 of the 1996 Act? Or to take the argument to its extreme, if the bare minimum is scribbled on the back of an envelope or a shopping list, is the back of this envelope or shopping list an instrument for the purposes of paragraph 5? A court would inevitably answer in the affirmative but the dilemmas posed indicate that the detail of the legislation has not been sufficiently thought through.²⁷¹

²⁶⁷ Emphasis added.

²⁶⁸ See section 130(1) of the Law of Property Act 1925.

²⁶⁹ Vol. 2: G-P (6th edn 2000) by Daniel Greenberg and Alexandra Millbrook.

²⁷⁰ See Section 25(2) and Schedule 4 to the 1996 Act.

²⁷¹ Harpum in *The Law Commission and the Reform of Land Law op. cit.*, p. 171 footnote 151 states that it has been suggested to him by a member of a well-known firm of solicitors with a large private client practice that it is ‘still possible’ to create an entail of personalty orally, because the Act deals only with purported dispositions by instrument. He states that why anyone would wish to do anything so strange is not apparent, but in any event, it has never been possible to create an entail of personalty

Meaning of grant

The word 'grant' is odd here, because one normally grants a legal estate²⁷² and one cannot grant a legal entail. The reason for the use of the word grant can be traced to the original clause 16 of the Law Commission's Bill which referred to purporting 'to grant any person a legal interest in tail' in (a) yet the same terminology was used in (b) for purporting 'to grant any person an equitable interest in tail'. Since paragraph 5 does not use the wording 'grant a legal interest in tail', the use of the word grant is inappropriate, because one does not normally grant equitable estates or interests.

Problematic drafting of paragraph 5(2)

Paragraph 5(1) was as far as the original Bill went. However, Schedule 1 now also includes paragraph 5(2) which states that, 'Where a person purports by an instrument coming into operation after the commencement of this Act to declare himself a tenant in tail of real or personal property, the instrument is not effective to create an entailed interest.' This was an amendment added in the House of Lords where the Lord Chancellor stated that, 'Amendment No. 30 closes a possible loophole; namely, where a person attempts to create an entailed interest not by granting it direct to another but by declaring himself a trustee in tail. In that case, the declaration in tail is simply ineffective, and the effect may be illustrated by an example.'²⁷³ The Lord Chancellor then went on to give an example: 'If A purports to declare himself a trustee in tail for B, he will simply remain the owner; and if he purports to declare himself trustee for B for life and C in tail thereafter, B's life interest will not be affected, but the property will simply revert to A, or his estate, when that life interest ceases.'

The Lord Chancellor's examples are problematic (for example what is a trustee in tail?) and he is wrong because they do not demonstrate the application of paragraph 5(2). His first example is not what paragraph 5(2) covers, since A is not declaring himself a tenant in tail, rather he is declaring himself to be a trustee in tail. That example is covered by paragraph 5(1), because A purports by an instrument to grant

orally due to sections 130(6) and 205(1)(xxvi) of the Law of Property Act 1925 and section 1(1) of the Settled Land Act 1925. It is unfortunate that Harpum does not deal with the repercussions of the repeal of section 130(6).

²⁷² See, for example, section 70(1)(k) of the Land Registration Act 1925 and para. 1 of Schedule 1 and paras. 1 and 2(d) of Schedule 3 of the Land Registration Act 2002.

²⁷³ H.L. Debs., Vol. 570, col. 1555.

to B an entailed interest. On applying paragraph 5(1), A holds the property in trust absolutely for B, whereas if paragraph 5(2) were to apply, B takes no interest whatsoever. The consequences are totally different for B and the Lord Chancellor is saying that B has no interest.

Similarly, in the second example, the Lord Chancellor is mistaken because paragraph 5(2) does not apply, since A is not declaring himself a tenant in tail. This second example is also covered by paragraph 5(1), since A is purporting to grant to C an entailed interest, so after B's life interest, A holds on trust absolutely for C. In addition, paragraph 5(2) has no (b). It states that the instrument is not effective but does not state what will happen. Paragraph 5(1) has (a) which states that the instrument is not effective and (b) which sets out the consequences of this. In paragraph 5(2) is the instrument void (which it is clearly not in paragraph 5(1)) or does it operate as a resulting trust? Either way A remains with his absolute (or lesser) interest. The wording of this sub-paragraph is deficient and paragraph 5(2) should have been omitted. Rather paragraph 5 should have been amended to include a person purporting by an instrument to declare himself a tenant in tail of real or personal property with the consequence that the instrument is not effective to create an entailed interest but operates instead as a resulting trust.

Does the repeal of section 130(1) and (2) enable the creation of entailed interests?

Section 130

Section 130(1) had two main effects: the strict requirements of the common law applicable to non-executory deeds were extended to wills and it extended the common law so that entailed interests could be created in personal property. Section 130(1) provided that, 'An interest in tail (in this Act referred to as an "entailed interest") may be created by way of trust in any property, real or personal, but only by the like expressions as those by which before the commencement of this Act a similar estate tail could have been created by deed (not being an executory instrument) in freehold land, and with the like results and accordingly all statutory provisions relating to estates tail in real property shall apply to entailed interests in personal property.'

Section 130(2) had the effect that if the requisite expression used in a deed was one which in a will would have created an entailed interest but not in a deed, then it would create the interest in land which would have been created if the property had been personal estate.²⁷⁴ Section 130(2) provided that, ‘Expressions contained in an instrument coming into operation after the commencement of this Act, which, in a will, or executory instrument coming into operation before such commencement, would have created an entailed interest in freehold land, but would not have been effectual for that purpose in a deed not being an executory instrument, shall operate in equity, in regard to property real or personal, to create absolute, fee simple or other interests corresponding to those which, if the property affected had been personal estate, would have been created therein by similar expressions before the commencement of this Act.’

Section 130(3) was a concession for personal property enjoyed with land in which an entailed interest had been created. Section 130(3) provided that, ‘Where personal estate is, after the commencement of this Act, directed to be enjoyed or held with, or upon trusts corresponding to trusts affecting, land in which, either before or after the commencement of this Act an entailed interest has been created, and is subsisting, such direction shall be deemed sufficient to create a corresponding entailed interest in such personal estate.’ Section 130(6) concerned the formalities for the creation of an entailed interest and has already been examined under the question of the need for an instrument.

Is section 16(1)(a) of the Interpretation Act 1978 applicable?

The argument advanced here is that the repeal of section 130(1) and (2) enables the creation of entailed interests, because section 16(1)(a) of the Interpretation Act 1978 does not apply. Section 16(1) of the Interpretation Act 1978 states that, ‘..... where an Act repeals an enactment, the repeal does not, unless the contrary intention appears,-
(a) revive anything not in force or existing at the time at which the repeal takes

²⁷⁴ See Cheshire and Burn *op. cit.*, p. 278-280 and S.J. Bailey *The Law of Property Act 1925, s. 130(2)* (1936) 6 C.L.J. 67 for an analysis of the complex issues of what interest passes under a gift of personalty. For a contrary view of the effect of section 130(2), see R.E. Megarry ‘*To A and his Issue*’: *the Law of Property Act, 1925, section 130(2)* (1945) 9 C.L.J. 46 and the reply by S.J. Bailey ‘*To A and his Issue*’: *the Law of Property Act, 1925, section 130(2)* with a note by J.H.C. Morris in (1946) 9 C.L.J. 185.

effect'. As Bennion states,²⁷⁵ it seems that the wording of (a) 'also applies to rules of common law which had been abrogated by the repealed Act and were therefore "not in force or existing" at the time the repeal took effect.' Bennion's view is that this application of paragraph (a) to common law rules 'is unsatisfactory, and can be said to be contrary to principle It makes little sense to say that a rule of common law is occluded by statute when the statute in question has been repealed.'²⁷⁶

Section 16(1)(a) does not, however, have the effect of repealing the common law for a number of reasons. First, section 130(1) to (3) and (6) did not abolish the common law on the creation of entails: it *modified* the common law. In these subsections the common law had been revised or reformed but not abrogated. Where the repealed provision did not in itself abolish the common law, the repeal of the statutory provision cannot have the effect of doing so. Only where the repealed provision abolished a rule of the common law would there be a direct analogy to a repealed provision that had repealed an earlier statute.

As Diamond stated in *Repeal and Desuetude of Statutes*,²⁷⁷ the relations between statute and common law are more complex than the relations between statute and statute. If the statute did not abolish the common law, then the common law is existing at the time at which the repeal takes effect and so the statute is not reviving 'anything not existing at the time at which the repeal takes effect.' The common law has continued to exist with a statutory requirement, now repealed, superimposed on it.²⁷⁸ It has been lying dormant and although it is not in force, it is existing though quiescent or suspended. This means that section 16(1)(a) does not apply.

Secondly, there is a contrary intention to displace section 16(1)(a). Since no contrary intention is expressed in section 25(2) or Schedule 4 of the 1996 Act, this means that an implied contrary intention must be sought. The argument is that on the wording of

²⁷⁵ F.A.R. Bennion *Statutory Interpretation A Code* (4th edn 2002) section 89 p. 258.

²⁷⁶ *Ibid.*, p. 259.

²⁷⁷ Aubrey Diamond [1975] C.L.P. 107 at 110. Diamond was writing on section 38(2) of the Interpretation Act 1889 which was the predecessor to section 16 of the Interpretation Act 1978. Section 16 of the 1978 Act made 'no effort to improve the notoriously opaque drafting': see Bennion *op. cit.*, p. 258 footnote 1.

²⁷⁸ See Diamond *op. cit.*, p. 111-112.

the relevant subsections of section 130, repeal removes the limitations and extensions imposed by section 130(1) to (3) and (6), so that after the repeal entailed interests can only be created in real property. It will not be possible to create entailed interests in personal property,²⁷⁹ because Statute *De Donis Conditionalibus* 1285 applied only to 'tenements' i.e. property held in tenure, real property. The current repeal has no effect on the 1285 Statute, since section 130 of the Law of Property Act 1925 did not repeal that Statute. Less formal language will create an entailed interest in a will and in an executory instrument but not in a non-executory deed.

Lastly, section 16(1)(a) does not apply because repeal does not 'revive'²⁸⁰ the common law, rather it restores or reimposes or reinstates it. This is related to the first argument that the common law is existing and lying dormant. It is, however, pedantic and captious to differentiate between words such as revive and restore, reimpose or reinstate on repeal. A different, weaker argument is that the word 'anything' in section 16(1)(a) is not apt to cover a rule at common law, since the subsection should have been more specific if it was intended to cover common law.²⁸¹ If 'anything' is construed to mean 'an enactment'²⁸² in the light of section 16(1) and section 15, then section 16(1)(a) will not apply. The better view, however, is that the term 'anything' is sufficiently wide to cover common law and a more specific reference was not necessary.

It must be questioned whether section 130 impliedly repealed the common law. There is a principle that where a statutory provision is contrary to a common law rule, Parliament is taken to intend the earlier to be repealed in accordance with the maxim *leges posteriores priores contrarias abrogant* (later laws abrogate earlier contrary

²⁷⁹ A purported grant of personalty in tail before 1926 gave the grantee absolute ownership of the property: see Megarry and Wade *op. cit.*, para. 3-087.

²⁸⁰ The term 'revive' has been considered judicially in relation to wills and codicils- *McLeod v. McNab* [1891] A.C. 471, *Re Dennis* [1891] P. 326 (reference to codicil did not revive it), *Re Chilcott* [1897] P. 223 (codicil revived the earlier will): see *Stroud's Judicial Dictionary of Words and Phrases op. cit.*, Vol. 3: Q-Z.

²⁸¹ See Diamond *op. cit.*, p. 110-111.

²⁸² Compare *Associated Newspapers Group v. Fleming* [1973] A.C. 628 where 'anything' was construed in the light of the preceding subsections to mean anything in the way of entertainment, and had no application to a newspaper proprietor whose trade was to provide newspapers: see *Stroud's Judicial Dictionary of Words and Phrases op. cit.*, Vol. 1: A-F.

laws).²⁸³ The test is whether section 130 is so inconsistent with or repugnant to the common law that the two cannot stand together. Examining section 130, the two can stand together. As Bennion states, there is a presumption against implied repeal.²⁸⁴ The courts presume that Parliament does not intend an implied repeal or an implied revocation of a common law rule.²⁸⁵

Effect of the repeal of section 130(1) and (2)

Therefore the startling conclusion is reached that a disposition in a will to A and his seed, A and his offspring,²⁸⁶ A and his issue,²⁸⁷ to A and his descendants²⁸⁸ or any expression indicating an intention to devise an inheritance to lineal and not collateral heirs may confer an entailed interest due to the repeal of section 130(2). How will paragraph 5 of Schedule 1 deal with this? The argument is that the entailed interest is not caught by paragraph 5(1) because 'a person does not purport to grant to another person an entailed interest'. Since there is no statutory provision preventing the existence of entailed interests, a devise drafted with such terminology is not caught by paragraph 5(1).

This view exploits a loophole in the existing legislation but this may not be upheld by the judiciary who would be reluctant to run contrary to the intention of the legislation and so would take a broad view of paragraph 5(1). However, if laws are passed which do not achieve the stated intention, it is up to Parliament to reform the law and not to the judiciary to remedy the defects exposed by inadequate legislation. It is an undesirable result as entails could arise unintentionally and one of the overriding forces behind the 1996 Act was the elimination of the unintentional creation of strict settlements. It would be an alarming irony if the unintentional creation of strict settlements were replaced by the unintentional creation of entailed interests.

²⁸³ See Bennion *op. cit.*, section 87.

²⁸⁴ *Op. cit.*, section 87.

²⁸⁵ *Jennings v. United States Government* [1982] 3 All E.R. 104.

²⁸⁶ *Young v. Davies* (1863) 2 Drew & Sm. 167.

²⁸⁷ *Slater v. Dangerfield* (1846) 15 M. & W. 263 at 272. Children *prima facie* meant descendants of the first generation only, and was less apt to create an entail than words such as issue, which *prima facie* included descendants of any generation and were the informal equivalent of heirs of his body: see Megarry and Wade (5th edn) *op. cit.*, p. 57. See also S.J. Bailey (1936) 6 C.L.J. 67 *op. cit.*, p. 76ff.

²⁸⁸ *Re Sleeman* (1929) W.N. 16- this was the decision of Clauson J. on the will of a testator who died before 1926.

Does the repeal of section 130(1) and (2) revive the rule in *Wild's Case*?

The rule in *Wild's Case*²⁸⁹ was that where realty was devised to A and his children and A had no child at the time that the will was made, the word children was prima facie construed as a word of limitation, with the result that A acquired an estate tail.²⁹⁰ The reasoning was that 'the intent of the deviser is manifest and certain that his children or issues should take and as immediate devisees they cannot take, because they are not *in rerum natura*, and by way of remainder they cannot take, for that was not his intent, for the gift is immediate, therefore such words shall be taken as words of limitation, *scil.* as much as children or issues of his body'.²⁹¹

An analysis of the case reveals that this was *obiter*, since the actual decision was that on the construction of the will, Rowland Wild and his wife had an estate for life with remainder to their children for life. Therefore even in *Wild's Case* the rule was not applied, since the devise was to parents for life 'and *after their decease* to their children'.²⁹² This rule was in any event disregarded by the courts where it would defeat the intention of the testator expressed elsewhere in the will.²⁹³ The rule obeyed the old principle that the time of making the will was the significant time even after the modern rule that the will speaks from death was adopted for other forms of gift.²⁹⁴ The original reason for this construction was that no person could benefit from an immediate gift unless he was in existence when the gift was made.

Nowadays a will does not operate until the testator's death so exponents of the rule seek some other justification for retaining the date of the will as the relevant time.²⁹⁵ The rule in *Wild's Case* never applies to a devise to A and his issue for the presumption is that the testator intended to confer an estate tail on A. After 1925 A

²⁸⁹ The rule is of even earlier origin from *Lovelace v. Lovelace* (27 Eliz.) Cro. Eliz. 40 as explained in *Re Cosby's Estate* (1922) 1 Ir. R. 120 at 132. See S.J. Bailey (1936) 6 C.L.J. 67 *op. cit.*, p. 78.

²⁹⁰ See Cheshire and Burn *op. cit.*, p. 278.

²⁹¹ *Op. cit.*, 17a and b, referring to a case, Trin. 4 Eliz. reported by Serjeant Bendloes, where one devised land to husband and wife and to the men-children of their bodies begotten. It did not appear in the case that they had issue male at the time of the devise and it was adjudged that they had estate tail to them and the heirs male of their bodies.

²⁹² Emphasis added. See S.J. Bailey (1936) 6 C.L.J. 67 *op. cit.*, p. 78.

²⁹³ *Byng v. Byng* (1862) 10 H.L.C. 171 at 178, *Roper v. Roper* (1867) 3 C.P. 32, *Bowen v. Lewis* (1884) 9 App. Cas. 890 at 897.

²⁹⁴ See Megarry and Wade *op. cit.*, para. 11-080.

²⁹⁵ See S.J. Bailey (1936) 6 C.L.J. 67 *op. cit.*, p. 78.

could not take an entail, because it could not be created by informal words.²⁹⁶ It is not wholly clear whether paragraph 5 of Schedule 1 would operate to prevent an entailed interest. Here the reasoning of Histed²⁹⁷ could be utilised. The settlor would not be purporting by an instrument to create an entailed interest but the court would do so. This turns on whether a judge is a 'person'. The best argument against this is that the Act uses the words 'the court' wherever required so the person referred to in paragraph 5 is not the court. Additionally the word grant refers to individual settlors or testators rather than a decision of the court. To avoid Histed's convoluted reasoning, it is preferable to state that paragraph 5 does not apply because the common law is being *applied* and this is not caught by the wording of paragraph 5.

Has the doctrine of *cy-près* survived the 1996 Act?

It is maintained here, that contrary to the view of Histed,²⁹⁸ the doctrine of *cy-près* has not survived the 1996 Act. This doctrine saved limitations from the destructive effects of two rules: the rule in *Whitby v. Mitchell*²⁹⁹ and the rule against perpetuities.³⁰⁰ It is unfortunate that the article by Histed does not interweave the rule in *Whitby v. Mitchell* into her intricate historical analysis, since the totality of the origins of the doctrine of *cy-près* are necessarily germane to any analysis.

Cy-près and the rule in Whitby v. Mitchell

The rule in *Whitby v. Mitchell*³⁰¹ was that after a limitation for life to an unborn person, any further limitation to his issue was void. So if land was given to a person for life (and such person was as yet unborn) with remainder to his issue, that remainder and all subsequent limitations to his issue were void. Kay J. stated that he

²⁹⁶ Megarry and Wade *op. cit.*, para. 11-081.

²⁹⁷ *Op. cit.* p. 469ff.

²⁹⁸ *Op. cit.*, p. 465ff.

²⁹⁹ (1889) 42 Ch. D. 494 per Kay J. and affirmed in the Court of Appeal (1890) 44 Ch. D. 85. The rule appears in *Perrot's Case* (1594) Moo K.B. 368, but was not clearly laid down until *Duke of Marlborough v. Earl Godolphin* (1759) 1 Eden 404 at 415, 416: see Megarry and Wade (5th edn) *op. cit.*, p. 1186.

³⁰⁰ For a history of the development of the rules against perpetuities, see Holdsworth *An Historical Introduction to the Land Law op. cit.*, p. 217-231 and J.H.C. Morris and W. Barton Leach *The Rule against Perpetuities* (2nd edn 1962) chapter 1.

³⁰¹ See generally Simpson *op. cit.*, 216ff and John Chipman Gray *The Rule against Perpetuities* (4th edn 1942, reprinted 2002) sections 931-947.

agreed that it is an absolute rule independent of the rule against perpetuities³⁰² and Cotton L.J. in the Court of Appeal stated³⁰³ that the basis of it was a rule called a possibility upon a possibility³⁰⁴ which has not been superseded by the modern law of perpetuities. His view was that they were two independent and coexisting rules.

The severity of the rule in *Whitby v. Mitchell* was mitigated by the application of the *cy-près* doctrine by saying that the testator had manifested a general intention that a particular unborn devisee and his issue should take certain property and the court, in support of the general intention to provide for the issue of the devisee, would vest an estate tail in him.³⁰⁵ The testator's general intention would be more closely effectuated if the eldest son was given an entail than if he took a mere life estate.³⁰⁶ Section 161 of the Law of Property Act 1925 abolished the rule in *Whitby v. Mitchell*. The general view, as typified by that of Morris and Leach,³⁰⁷ is that section 161 has the consequence that to the extent that the doctrine of *cy-près* was a mitigation of the rule in *Whitby v. Mitchell*, *cy-près* cannot be applied. Section 161 has not been repealed by the 1996 Act so according to this view, only to the extent that *cy-près* was a mitigation of the modern rule against perpetuities can *cy-près* still be applied.³⁰⁸

Cy-près and the rule against perpetuities

The second situation where *cy-près* applied was where a testator devised a perpetual series of life estates to a person and his issue in succession with cross-remainders, if

³⁰² *Op. cit.*, p. 502.

³⁰³ *Op. cit.*, p. 89-91.

³⁰⁴ This rule was invented by Popham C.J. in *Rector of Chedington's Case* (1598) 1 Rep. 153a, 156b and repudiated by Lord Nottingham in the *Duke of Norfolk's Case* (1682) 3 Ch. Cas. 1 at 29. Megarry and Wade (5th edn) *op. cit.*, p. 1187 criticise the description of the rule- the rule against double possibilities or the rule that a possibility upon a possibility is void- as unsuitable: see *Re Nash* [1910] 1 Ch. 1 at 10. Cheshire and Burn *op. cit.*, p. 310 state that it was really a particular application of the parent rule that the grant of an unbarrable entail is void. A few months later in *Re Frost* (1889) 43 Ch. D. 246 Kay J. decided that legal contingent remainders were subject to the modern rule against perpetuities: see Morris and Leach *op. cit.*, p. 259.

³⁰⁵ See L.A. Sheridan and V.T.H. Delany *The Cy-Près Doctrine* (1959) p. 12 and *Robinson v. Hardcastle* (1788) 2 T.R. 241 at 254.

³⁰⁶ See R.E. Megarry *Perpetuities and the Cy-Près Doctrine* (1939) 55 L.Q.R. 422 at 423.

³⁰⁷ *Op. cit.*, p. 264.

³⁰⁸ The view expressed in *Wolstenholme and Cherry's Conveyancing Statutes* by J.T. Farrand (13th edn 1972) Vol. 1 p. 291 was that section 161 does not affect the *cy-près* doctrine but this rule has been abolished by section 130(1), since no entailed interest can after 1925 be created by expressions which would not have created an entailed interest in a deed not executory and the rule was never applied to limitations in a deed not being an executory instrument.

there was a gift over on failure of issue sufficient to show an intention to give an estate tail, in such a case, the first generation that was unborn at the testator's death took an estate tail by *cy-près*.³⁰⁹ *Cy-près* did not apply if the estates were limited by deed.³¹⁰ The *cy-près* doctrine rescued descendants from ill-drawn wills which infringed the rule against perpetuities.³¹¹

Histed pays insufficient attention to the view of Gray³¹² that the doctrine of *cy-près* was not to be extended.³¹³ Gray stated that 'this doctrine has always been regarded with suspicion and disapproval by the ablest judges.' Lord Kenyon stated in *Brudenell v. Elwes* that, 'The doctrine of *cy-près* goes to the utmost verge of the law.... We must take care that it does not run wild... I know that great judges entertained considerable scruples at the time concerning that decision. [*Pitt v. Jackson*.³¹⁴] It went indeed to the outside of the rules of construction.'³¹⁵ Sir J. L. Knight Bruce V.-C. in *Boughton v. James* said, 'The doctrine has gone, at least, far enough.'³¹⁶ The Court of Exchequer in *Monypenny v. Dering* stated, 'Without, therefore, meaning to say that the doctrine [of *cy-près*] on which Lord Kenyon proceeded, and which V.C. Wigram felt himself bound to follow, is satisfactory to our minds, it is sufficient for us to say that those authorities are not precisely in point, and we do not feel inclined to carry the doctrine on which they rest one step further.'³¹⁷

³⁰⁹ See Morris and Leach *op. cit.*, p. 263. The doctrine did not apply if there was no gift over on failure of issue (*Re Richards* [1904] 1 Ch. 332) or if the series of life estates was limited to a stated number of generations (*Seaward v. Willcock* (1804) 5 East 198), since no intention to give an estate tail could be implied in such cases. It also did not apply if the testator gave successive terms of years determinable on the death of the devisee (*Somerville v. Lethbridge* (1795) 6 T.R. 213 and *Beard v. Westcott* (1822) 5 B. & Ald. 801). At first the doctrine applied to cases of executory trusts but later to direct devises (*Pitt v. Jackson* (1786) 2 Bro. C.C. 51).

³¹⁰ *Brudenell v. Elwes* (1801) 1 East 442.

³¹¹ See *Humberston v. Humberston* (1716) 1 P.Wms 332, a decision of Lord Cowper. For more detail, see Holdsworth *A History of English Law op. cit.*, Vol. VII p. 211ff. The doctrine of *cy-près* was initially seen as an indulgence granted to a testator who attempts to create an unbarrable entail: see Histed *op. cit.*, p. 446.

³¹² J.C. Gray *op. cit.*, section 651.

³¹³ Section 651 and see also section 877. Gray quotes a large number of sources and see also Morris and Leach *op. cit.*, p. 264: *Brudenell v. Elwes op. cit.*, per Lord Kenyon, *Boughton v. James* (1844) 1 Coll. 26 at 44 per Knight Bruce V.-C., *Hale v. Pew* (1858) 25 Beav. 335 at 338 per Lord Romilly, *Bristow v. Warde* 2 Ves. Jr. 336, *Monypenny v. Dering* (1847) 16 M. & W. 418 at 434 per Rolfe B., *Re Mortimer* [1905] 2 Ch. 502 at 505 per Farwell J., at 512 per Vaughan Williams L.J., at 513 per Stirling L.J., *Dennehey's Estate* 17 Ir. Ch. 97.

³¹⁴ (1786) 2 Bro.C.C. 51.

³¹⁵ *Op. cit.*, at 451.

³¹⁶ *Op. cit.*, at 44.

³¹⁷ *Op. cit.*, at 434.

In this category of successive life estates in perpetuity, Megarry's view³¹⁸ was that the *cy-près* doctrine could not apply after 1925, because of section 130(1) of the Law of Property Act 1925 for two reasons. First, section 130(2) would convert a momentary entail to the first unborn generation into a fee simple. It was one of the fundamentals of the *cy-près* doctrine that the construction adopted by the courts must be one which would be capable of carrying the property to all persons whom the testator intended to benefit and to no others. Secondly, there was a view that the doctrine could not apply where a fee simple would be created.³¹⁹ If the *cy-près* doctrine did not apply, what effect would the repeal of section 130(1) and (2) by the 1996 Act have? Where there are successive life interests in perpetuity, the view of Histed cannot be supported. Application of the *cy-près* doctrine could not be the intention of the testator, since this is something he could not do expressly by instrument.

Cy-près after 1996

Analysing the two possible origins of *cy-près*, neither could be applicable. First, the rule of construction, that a general intent can overrule a particular intent of the testator where the particular one cannot take effect,³²⁰ would not apply after 1996 because there can be no general intent to create an entailed interest. Secondly, the view that the doctrine of *cy-près* was not a rule of construction, but a discretionary intervention by the Chancellor to save a disposition which would otherwise have been struck down as void for perpetuity³²¹ would not prevail, because a court would not voluntarily impose a type of interest which Parliament had intended to abolish whether or not it had been successful in doing so.

The only category that Megarry recognised that the *cy-près* doctrine would apply to after 1925 was where after a life interest to an unborn person, there was a remainder in tail to his issue, strict words of limitation being used, such as to A for life, remainder to his eldest son for life, remainder to that son's first and other sons successively in tail male. His view was that 'like expressions' in section 130(1)

³¹⁸ (1939) 55 L.Q.R. 422 *op. cit.*, p. 430-431.

³¹⁹ See J.C. Gray *op. cit.*, sections 663-670.

³²⁰ See *Monypenny v. Dering* (1852) 2 De G.M. & G. 145 at 173 per Lord St. Leonards, *Parfitt v. Hember* (1867) L.R. 4 Eq. 443 at 447 per Lord Romilly, *Hampton v. Holman* (1877) 5 Ch. D. 183 at 190. See generally Histed *op. cit.*, p. 460-461.

³²¹ See Histed *op. cit.*, p. 462.

should mean ‘words of limitation’ and not ‘the whole limitation including the circumstances at the time of the gift’³²² and that after 1925 the doctrine of *cy-près* should apply where after a life interest to an unborn person, there is a remainder in tail to his issue, strict words of limitation being employed. The view of Morris and Leach³²³ is that Megarry’s argument allows insufficient force to the word ‘similar’ in the section, because the estate tail raised by the *cy-près* doctrine was an estate tail by implication and no estate tail was ever raised by implication in a deed.

In any event, after 1996, the doctrine of *cy-près* would have no part to play, since such a limitation would be caught by paragraph 5 of Schedule 1, converting the remainder to a declaration that the property is held in trust absolutely for the person to whom an entailed interest was purportedly granted, and after applying the wait and see rule, a court would have no justification for applying the *cy-près* doctrine. If A had no son, the equitable *cy-près* doctrine cannot operate after the statutory provisions of the Perpetuities and Accumulations Act 1964, because the 1964 Act leaves no room for the operation of the doctrine of *cy-près* and the view of Histed to the contrary³²⁴ cannot be supported.

Since the perpetuity rule defeated many gifts which might have vested within the permitted period, the principle of wait and see was introduced by the 1964 Act which supersedes the *cy-près* doctrine. To apply the *cy-près* doctrine would be unwarranted judicial interference in an area governed by Statute. The doctrine of *cy-près* and the wait and see rule do not co-exist in English law. A gift which would be void for perpetuity at common law is now to be void only if and when circumstances make it clear that it can only vest outside the perpetuity period. If circumstances make this clear at the outset, the gift is void from the beginning.³²⁵

³²² This is to deal with the example of ‘to A for life, remainder to his eldest son for life, remainder to that son’s first and other sons successively in tail male’ where Megarry is of the view (1939) 55 L.Q.R. 422 *op. cit.*, p. 432 that even if A is a bachelor, it can be construed *cy-près* for words of limitation have been used which would have sufficed to create an entail in a deed before 1926.

³²³ *Op. cit.*, p. 265.

³²⁴ *Op. cit.*, p. 467-468.

³²⁵ See Megarry and Wade *op. cit.*, para. 7-031.

Maudsley proposes as one solution to the problem of the rule against perpetuities giving the court a power to adjust a void limitation to render it valid, altering as little as possible and observing the settlor's or testator's intention as far as possible.³²⁶ This would plainly not have to incorporate entailed interests but could be a generalised *cy-près* jurisdiction. This has been enacted in a number of jurisdictions, mostly American, either independently or in conjunction with wait and see.

There would be no chance that English courts would adopt *cy-près* to reform the perpetuity rule. The English courts show a great reluctance to exercise any power to 'rewrite the instrument' for any of the parties.³²⁷ Maudsley drafted a model Perpetuities and Accumulations Act and proposed a statutory basis to *cy-près* after the expiry of the wait and see period.³²⁸ In 1993 the Law Commission in its Consultation Paper³²⁹ suggested five options, one of which was to introduce a *cy-près* power for the court to reform dispositions. In 1998 the Law Commission³³⁰ did not adopt the proposals concerning *cy-près*, instead proposing one fixed perpetuity period of 125 years³³¹ and the wait and see principle.³³² The response to the proposal to adopt a *cy-près* system in the Consultation Paper was 'at best lukewarm. A number of difficulties were identified in adopting any such scheme. It would make the law still more complicated and at the same time less predictable. It was thought that it would be rarely used, and difficulties were anticipated in identifying the settlor's intention and in defining the court's jurisdiction. In the light of our other proposals, we have decided not to pursue further such a scheme.'³³³ It is therefore most unlikely that the *cy-près* doctrine has survived the 1996 Act.

³²⁶ Ronald H. Maudsley *The Modern Law of Perpetuities* (1979) p. 81-82, 228-229 and 263.

³²⁷ See Maudsley *ibid.*, p. 81.

³²⁸ See clause 11 *ibid.*, p. 263.

³²⁹ *The Law of Trusts: The Rules against Perpetuities and Excessive Accumulations* Consultation Paper No. 133 para. 5.57.

³³⁰ Law Commission Report No. 251: *The Rules against Perpetuities and Excessive Accumulations*. See also P. Sparkes *Perpetuities Reform* (1998) 12 T.L.I. 148.

³³¹ Para. 8.13.

³³² Para. 8.25.

³³³ Para. 8.31.

Conclusion

Insufficient care has been taken in drafting, scrutinising and considering the consequences of the legislation.³³⁴ As Histed declared, 'To change fundamental areas of this law requires immense care in the manipulation of concepts and doctrines, not the hatchet of sweeping prohibition which seems to commend itself to the modern mind.'³³⁵ Any such move to create entailed interests can be seen as retaliation for the removal of hereditary peers from the House of Lords, thus asserting the peers' authority and refusal to be subdued. Lord Irvine of Lairg recently stressed in a different context the contemporary importance of the Magna Carta as continuing to resonate in modern law, which is clearly lacking in paragraph 5 of Schedule 1.³³⁶ Amending legislation would be the most efficacious way of dealing with any potential challenge and any provision should be drafted to state simply and categorically that it is no longer possible to create entailed interests and any attempt to do so will be void.

³³⁴ Compare the view of Harpum in *The Law Commission and the Reform of Land Law op. cit.*, p. 172 who states that it is inconsistent to retain a rule against perpetuities while allowing the continued creation of entails, which can and do endure for centuries. Harpum criticises Matthews' view in *If it ain't broke, don't fix it* (1996) 10 T.L.I. 97 of the foolish policies behind the Act and maintains that the policies are anything but foolish, but are rooted in some of the most fundamental principles of English property law.

³³⁵ *Op. cit.*, p. 472.

³³⁶ *The Spirit of Magna Carta Continues to Resonate in Modern Law* (2003) 119 L.Q.R. 227.

CHAPTER 6- POWERS OF TRUSTEES: AN EXPEDIENT OR IMPRUDENT REFORM?

DO SOLICITORS CONSIDER IT ADVANTAGEOUS THAT TRUSTEES OF LAND UNDER SECTION 6 HAVE WIDER POWERS THAN PREVIOUSLY, HAVING NOW POWERS OF AN ABSOLUTE OWNER?

All the solicitors consulted stated that it was an advantage that trustees of land now have wider powers than previously.

Some of the solicitors had considerable praise for the reforms such as Christopher Jessel (Farrer and Co) who stated that, *'Section 6 is worth the whole of the rest of the Act. When I saw the Bill, I thought it was worth it even if the rest of the Bill is not.'*

Other solicitors were more circumspect in their approval. William McBryde (Assistant Official Solicitor) lamented the fact that, *'.... when you are dealing with will trusts, the wider powers apply to the land and not to the personalty which strikes me as a very odd result. You need to extend the powers for personalty if you are going to have the flexibility. It is a pity that the Law Commission did not address that problem more universally than dealing with it in part because you are getting hybrid trusts now.'* The fact that there are different regimes for land and personalty makes the law more complex and does not provide a unitary system for trusts in this narrow sense.

Problematic drafting?

The Law Commission was of the view that *'we consider that trustees of land should be put in much the same position as an absolute owner. It is desirable that trustees should have the powers necessary to make efficient use of the land. Our proposals are designed to reflect this state of affairs whilst maintaining the general equitable duties of trustees. Therefore, although the powers will be approximate to those of an absolute owner, they will not be quite as readily exercisable.'*³³⁷ The

³³⁷ Law Com. No. 181 para. 10.4.

powers under section 28 of the Law of Property Act 1925³³⁸ were too restrictive³³⁹ and necessarily extended in practice.

Section 6(1)

Yet the repeal of section 28 and the drafting of section 6(1) itself are not free of problems. Section 6(1) states that, 'For the purpose of exercising their functions as trustees, the trustees of land have in relation to the land subject to the trust all the powers of an absolute owner.' There are two restrictions contained within section 6(1): firstly, 'For the purpose of exercising their functions as trustees'³⁴⁰ and secondly, the powers of an absolute owner are limited to those powers 'in relation to the land.' Kenny and Kenny state that, 'For a section which is clearly intended to be an unproblematical extension of trustees' powers the opening words are unhelpfully ambiguous.'³⁴¹

The first limitation 'For the purpose of exercising their functions as trustees' is arguably superfluous wording as the same effect would be achieved without these words, since any exercise by the trustees of their powers for an improper purpose would be a breach of trust and be in contravention of section 6(6). Kenny and Kenny state that, 'If the words add anything to the sense (which may be doubted) they must add this- the trustees (who must still act as trustees) have, in relation to the land, the powers conferred by section 6.'³⁴² It is difficult to see how this construction can add anything to section 6(1) and how this circuitous and tautologous wording can be

³³⁸ They are 'all the powers of a tenant for life and the trustees of a settlement under the Settled Land Act 1925'. The Law Commission in para. 10.5 footnote 116 referring to section 28 stated that, 'This definition by analogy is rather clumsy, and does not provide trustees for sale with a sufficiently extensive set of powers.'

³³⁹ See Barraclough and Matthews *op. cit.*, para. 5.1, Megarry and Wade (5th edn) *op. cit.*, p. 391-395, Gray *Elements of Land Law* (2nd edn) *op. cit.*, p. 539-540, Cheshire and Burn's *Modern Law of Real Property* by E.H. Burn (15th edn 1994) p. 205-208.

³⁴⁰ A similar phrase appears in section 9 (delegation- any of their functions as trustees which relate to land), section 10 (consents- any function relating to the land), section 11 (consultation- any function relating to land), section 14 (power of court- any of their functions), section 18 (functions of personal representatives), section 20 (incapable trustee- functions as trustees).

³⁴¹ *Op. cit.*, p. 8.

³⁴² *Op. cit.*, p. 8.

supported. This wording was not in section 28 of the Law of Property Act 1925 and not in clause 4 of the Bill attached to the Law Commission Report.³⁴³

Function is not defined in the statute nor in the Law of Property Act 1925. As Whitehouse and Hassall state, 'Function is a singularly inelegant word and it is unfortunate that that it has been employed instead of the more familiar (and accurate) "powers and duties"'.³⁴⁴ The word function may be even wider than power and duty and incorporate any action done by a trustee in his capacity as trustee. Functions certainly incorporate rights, duties, powers and discretions of trustees, since these embody the scope of the trustee's activities. In *Notting Hill Housing Trust v. Brackley*³⁴⁵ the Court of Appeal examined the meaning of 'function' within section 11 and Peter Gibson L.J. gave it a broad interpretation. He stated that, 'I accept that the word "function" is a wide one. But in my judgment it is quite clear that in relation to trustees what one has to consider is whether the action of each of them, if such action is called into question, is the exercise of a power or a duty, that is to say a function, such as to bring the duty under section 11 into operation.'³⁴⁶ The opening words of section 6(1) are a seemingly deliberate inclusion to counter the wide powers given by section 6(1) and to clarify beyond doubt, albeit unnecessarily so, that the powers are conferred on trustees as trustee and not as absolute owner.

The second limitation, that the powers are limited to those powers 'in relation to the land', is significant, since it does not broaden the trustees' powers to allow them to invest in personalty as was commented on by some of the solicitors in their replies. This is where the lack of a complete, all-inclusive policy covering land and personalty

³⁴³ Clause 4 provided that for section 28(1) of the Law of Property Act 1925, there shall be substituted, 'Subject to the provisions of this section and to any restrictions imposed by any enactment on the exercise by trustees of land of any particular power, such trustees shall have all the powers of an absolute owner in relation to the land subject to the trust.'

³⁴⁴ *Op. cit.*, para. 14.34(e).

³⁴⁵ [2001] E.W.C.A. 601, [2001] E.G. 106. The judges in the Court of Appeal were unanimous in their view that the giving of notice to quit by one joint tenant under section 11 was not a function relating to a trust of land. Peter Gibson L.J. stated para. 23 that the reason was that, 'It is no more than the exercise by the joint tenant of his or her right to withhold his or her consent to the continuation of the tenancy into a further period.' Jonathan Parker L.J. stated para. 32 that, 'in serving such a notice a joint tenant is not acting as a trustee'

³⁴⁶ *Ibid.*, para. 15.

is demonstrated. It is regrettable that the legislation has been fragmentary and unmethodical.

It is odd, again exemplifying the lack of homogeneity in this whole field, that the word 'land' is defined in section 205(1)(ix) of the Law of Property Act 1925, as amended by the Trusts of Land and Appointment of Trustees Act 1996 section 25(2) and Schedule 4, but that definition is not used in the Trustee Act 2000, which means that the definition contained in the Interpretation Act 1978³⁴⁷ needs to be analysed. The definition in the Law of Property Act 1925 as amended is far wider,³⁴⁸ thus leading to a potential discrepancy and the theoretical, though unlikely, result that the definition of land in section 8 of the Trustee Act 2000 may exclude trustees from investing in 'land' which they may have been previously been able to invest in under the 1996 Act. If, for example, the issue arose as to whether the trustees could invest in mines, this is clearly covered by the Law of Property Act definition, but left to judicial interpretation under the Trustee Act 2000 whether mines are included in 'other structures'.

Section 6(5)

Section 6(5) is an odd subsection, since a trustee is obliged to have regard to the interests of beneficiaries in any event³⁴⁹ and the subsection demonstrates incoherence of objectives of the draftsman. Trustees are under a general duty to act in the best interests of the trust, which means in the best interests of the beneficiaries.³⁵⁰ This duty is in addition to the general duty under trusts law, not instead of it. Clause 4(3) of

³⁴⁷ Section 5 and Schedule 1- unless a contrary intention appears, 'land' includes 'buildings and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land.'

³⁴⁸ See section 205(1)(ix).

³⁴⁹ The Trustee Act 2000 does not contain any similar provision in Part III and the Notes to that Act comment that, 'The express duty to have regard to the interests of the beneficiaries in exercising power under s. 6(5) is not replicated However that provision merely clarifies what is already the law and the omission of an equivalent provision is not intended to diminish the obligations of trustees.' See Whitehouse and Hassall *op. cit.*, para. 2.42. See also Lewin *on Trusts op. cit.*, para. 37-16.

³⁵⁰ Most of the traditional duties of trustees would seem to be examples of the duty to act fairly or with an even hand as between beneficiaries with different interests. The same general duty also requires a trustee to act impartially between a life tenant and the remainderman. Although the purpose of the rule is often said to be to attain 'equal' treatment for all beneficiaries, it would seem more accurate to regard it as achieving a broad fairness: see Thomas *on Powers op. cit.*, paras. 6-166-6-167. See also Megarry V.-C. in *Cowan v. Scargill* [1985] Ch. 270 at 287 who stated that, 'The starting point is the duty of trustees to exercise their powers in the best interest of the present and future beneficiaries of the trust. This duty of the trustees towards their beneficiaries is paramount.'

the draft Bill attached to the Law Commission Report was worded differently:

‘trustees of land shall have regard to the rights and claims of all the persons interested in the land (whether beneficially or otherwise)’ which explains the use of the word rights, since the original clause was not restricted to beneficiaries.

The Lord Advocate, Lord Mackay, at the Second Reading of the Bill in the House of Lords stated that the Bill ‘is subject to the requirement to act in accordance with the general equitable duties attaching to the position of trustee, in particular the duty to have regard to the interests of the beneficiaries in exercising such powers.’³⁵¹

Yet the subsection was not worded in such a way. Section 6(5) may also seem unnecessary in the light of the duty to consult under section 11, though the parameters of section 6(5) and section 11 are different.

Section 6(6) and (8)

The wording of section 6(6) seems unduly complex, contorted and unnecessary. A power would have to comply with rules of law and equity in any event, so section 6(6) serves no purpose other than to restate general principles. It seems that every case will have to be construed on its facts as to whether the wide power under section 6(1) will prevail or whether rules of law or equity will interfere with this. Misconduct will in most cases be a breach of the rules of equity and it is irrelevant that every breach of law or equity may not be misconduct. Kenny and Kenny argue that the literal effect of section 6(6) is that any exercise of a power in breach of any rule of law or equity is void.³⁵² This cannot be right as Kenny and Kenny intimate later on in that paragraph, a power in relation to unregistered land is not invalidated as against a purchaser who ‘has no actual notice of the contravention.’³⁵³ Section 6(8) seems to serve less purpose than section 6(6) and is surplus to requirements.

³⁵¹ *Op. cit.*, Vol. 569, col. 1719.

³⁵² *Op. cit.*, p. 8.

³⁵³ Section 16(2) of the 1996 Act.

Is it undesirable to limit investment to land in the United Kingdom?

The statutory provisions

Since there was no power to purchase land in the Trustee Investments Act 1961, section 6(3) of the 1996 Act gave trustees such a power limited to a legal estate in England and Wales. The Trustee Act 2000 amended the original section 6(3) of the 1996 Act to extend the power conferred by section 8 of the Trustee Act 2000 to land in Scotland and Northern Ireland. Section 6(3) of the 1996 Act states that, ‘The trustees of land have power to acquire land under the power conferred by section 8 of the Trustee Act 2000.’ Section 8(1) of the Trustee Act 2000 states that, ‘A trustee may acquire freehold or leasehold land in the United Kingdom

The reasoning behind the confinement of the power to the United Kingdom is contained in the Law Commission Report *Trustees’ Powers and Duties*³⁵⁴ and is that, ‘The concept of the trust is not universally recognised and, even in those jurisdictions that do recognise trusts, the law does not necessarily give effect to the safeguards for the protection of the interests of beneficiaries against the claims of third parties that apply in England and Wales.’³⁵⁵ Another reason is that jurisdictions with forced heirship provisions would cause difficulties in dealing with the land if trustees bought land in those jurisdictions and were not aware of the rules.

Circumvention

The fact that section 8 of the Trustee Act 2000 is confined to land in the United Kingdom is too narrow in the light of the current global economy.³⁵⁶ Many trustees

³⁵⁴ Law Com. No. 260 (1999) para. 2.42.

³⁵⁵ As a general rule, the courts have no jurisdiction to entertain an application for the determination of the title to, or the right to possession of, any immovable (which term obviously includes land) situated abroad: *British South Africa Company v. Companhia de Mocambique* [1893] A.C. 602. However where a court has jurisdiction *in personam* over a defendant, it will enforce a limited range of obligations against him in relation to foreign land: see *Penn v. Baltimore* (1750) 1 Ves. Sen. 444, 27 E.R. 1132. In such circumstances the court may grant a declaration that the defendant holds foreign land as trustee: *Cook Industries Inc. v. Galliher* [1979] Ch. 439. Nevertheless the courts have always applied the *lex situs* to the essential validity of trusts of immovables and if the foreign *lex situs* does not recognise trusts of land, the trust will fail: see *Re Pearse’s Settlement* [1909] 1 Ch. 304. The recognition of trusts in a number of states such as Italy, The Netherlands, Luxembourg and Malta is governed by the Hague Convention on the Law Applicable to Trusts and on their Recognition 1985 (incorporated into law in the United Kingdom by the Recognition of Trusts Act 1987). See generally para. 2.42 footnote 88 of Law Com. No. 260 for more details of the Convention.

³⁵⁶ See, for example, Penelope Reed and Richard Wilson *The Trustee Act 2000 A Practical Guide* (2001) para. 4.17.

hold land in other jurisdictions, particularly if there are beneficiaries who are resident there, or some other connection between the trust and that country. It could be argued that there should be a list of countries which have ratified the Hague Convention on Trusts where there would be little difficulty in the beneficiaries being protected. The solution to the law as it now stands is that it is up to settlors to confer express powers for trustees to acquire land in jurisdictions which are not part of the United Kingdom, because the Law Commission did not consider that it would be appropriate to confer such powers as a default position.³⁵⁷ Alternatively, interests in foreign land may be acquired by acquiring shares in a company that owns foreign land.³⁵⁸

A very important point about the territorial application of the 1996 Act arose at first instance in *Ashurst v. Pollard*.³⁵⁹ The issue was whether Mr Pollard's trustee in bankruptcy could obtain an order for sale of a jointly owned villa in Portugal or whether the Portuguese courts had exclusive jurisdiction, because the proceedings had as their object rights *in rem* in immovable property for the purposes of Article 16(1) of Schedule 1 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968. It had been argued by counsel for the Pollards that since section 27(3) provides that the 1996 Act extends only to England and Wales, no order could be made under the 1996 Act.

Jacob J. at first instance circumvented this by stating, 'That it is self evidently so but seems to me to be irrelevant. What the 1996 Act does not say is that the court cannot act in relation to trust property held abroad or that similar orders as can be made under the 1996 Act cannot be made by virtue of the court's jurisdiction over property held under an English trust.'³⁶⁰ In the Court of Appeal³⁶¹ Jonathan Parker L.J. stated that counsel for the Pollards 'does not repeat in this court the submission which he made to Jacob J. to the effect that the English court has no jurisdiction to make orders in relation to trust property held abroad: he accepts that such jurisdiction exists, independently of the Trusts of Land and Appointment of Trustees Act 1996. He

³⁵⁷ See Law Com. No. 260 para. 2.42.

³⁵⁸ See Hayton and Marshall *op. cit.*, para. 9-124 footnote 29 and Whitehouse and Hassall *op. cit.*, para. 11.74.

³⁵⁹ [2000] 2 All E.R. 772.

³⁶⁰ *Ibid.*, para. 20.

³⁶¹ [2001] 2 All E.R. 75 para. 24.

submits, however, that it is a jurisdiction which the court will rarely exercise in practice, and that it should not be exercised in the instant case.’

The actual basis of the Court of Appeal decision, following *Webb v. Webb*,³⁶² was that Article 16(1) did not apply because the proceedings did not have as their object rights *in rem* in immovable property since ‘no issue arises as to the factual situation in Portugal, nor do the proceedings involve any question of Portuguese law or practice. the proceedings do not seek to assert any property right against third parties/strangers: rather, they raise personal issues as between the trustee on one hand and Mr and Mrs Pollard on the other.’³⁶³ Jonathan Parker L.J. rationalised that ‘the fact that the resolution of a dispute as to personal rights (rights in personam) may impact upon property rights enforceable against third parties/strangers (rights in rem) does not in my judgment lead to the conclusion that the subject matter of the proceedings for the purposes of article 16(1) is rights in rem.’³⁶⁴ Consequently the English court had jurisdiction in relation to the proceedings based on reasoning which may seem artificial and contrived, but which can be attributed to the end result justifying the means adopted in order that the court could reach the conclusion which the judges wanted to reach. Therefore, so long as the action is framed as an action *in personam*, English courts will have jurisdiction.

Harris’ view is that although the Hague Trusts Convention leads to the application of the law applicable to the trust, and not the *lex situs*, given the exclusive control ordinarily exercised by the courts of the *situs* in disputes concerning land and the risk of unenforceability in the *situs*, it is far from obvious that the 1996 Act should be

³⁶² [1994] Q.B. 696. For criticisms of *Webb v. Webb*, see Adrian Briggs *Trusts of Land and the Brussels Convention* (1994) 110 L.Q.R. 526 who questions whether it is helpful to see the right of the beneficiary as one *in personam* where the right would be enforceable against a transferee, unless he were a species of *bona fide* purchaser. Adrian Briggs in *Ordering the Sale of a Bankrupt’s Land in Portugal* (2000) 71 B.Y.B.I.L. 443 at 445 was far more vitriolic in his condemnation of *Webb* stating that, ‘It was appalling reasoning in *Webb*, but it represents the law, and proves that if hard cases make bad law, bad lawyers can make worse.’ For more favourable appraisal of *Webb*, see Catharine MacMillan *The European Court of Justice Agrees with Maitland: Trusts and the Brussels Convention* [1996] Conv. 125 at 129 who rightly indicates that it is preferable that the determination of a trust created in England be made by an English court, though she recognises that if the trustee had conveyed to a third party in the country where the property was situated, it becomes much more difficult to assert that the case involves merely a personal relationship between a trustee and a beneficiary. See also Pippa Rogerson *Equity, Rights in Rem and the Brussels Convention* [1994] C.L.J. 462.

³⁶³ *Op. cit.*, paras. 54 and 55.

³⁶⁴ *Op. cit.*, para. 56.

construed as applying to land situated overseas.³⁶⁵ Jacob J. was specifically addressing section 14, although his comments appear applicable to the whole Act. This could be problematic in seeking to enforce a right to occupy under section 12 or exclusion of a beneficiary under section 13 in a foreign jurisdiction. Harris is right that the sweeping statement of Jacob J. ‘as to the territorial reach of the 1996 Act appears exorbitant and distinctly dubious’.³⁶⁶

Is the power to acquire land sufficiently comprehensive?

Limitations

The power applies to freeholds and leaseholds which are no longer restricted to land held for a term of at least 60 years. The effect of section 8(2)(a) of the Trustee Act 2000³⁶⁷ is that trustees cannot invest in equitable freeholds or leaseholds nor in equitable interests in land,³⁶⁸ such as a beneficial interest in a commercial property, which might provide a very good return, or in other legal interests in land such as rentcharges,³⁶⁹ which may be a serious lacuna. Trustees may be able to combine together with third parties to purchase a share of land as the statutory definition of ‘land’³⁷⁰ includes any interest in land, provided that the trustees hold the legal estate. There may be a difficulty if trustees of different trusts with different trustees wish to combine together to buy freeholds or leaseholds since, even if there is no requirement for the legal estate to be vested in purchasing trustees to the exclusion of other legal

³⁶⁵ See Jonathan Harris *Ordering the Sale of Land Situated Overseas* [2001] L.M.C.L.Q. 205 at 213-214 who is generally critical of the decision in *Pollard*. Harris at 209, whilst recognising that *Pollard* was a weaker case for application of Article 16 than *Webb*, questions whether the proceedings had as their object rights *in rem* in immoveable property on the basis that the proceedings sought, ultimately, to bring about a change in ownership of the land. See also Briggs *Ordering the Sale of a Bankrupt's Land in Portugal op. cit.*, at 445 who argues that the effect of English bankruptcy law making the trustee legal owner of all property of which the bankrupt had been legal owner is a matter which has a right *in rem* as its object.

³⁶⁶ *Op. cit.*, p. 214.

³⁶⁷ Section 8(2) states that, “Freehold or leasehold land” means- (a) in relation to England and Wales, a legal estate in land’.

³⁶⁸ Reed and Wilson *op. cit.*, para. 4.19 postulate that in jurisdictions where equitable interests in land are not regarded as land as such (and give the example of the case in this jurisdiction prior to the abolition of the doctrine of conversion), trustees will be able to invest in those interests in land by relying on the general power of investment.

³⁶⁹ These were permitted by the Trustee Investments Act 1961 and for trustees who have invested in perpetual rentcharges before the coming into force of the Act, they will not be regarded as exceeding their powers of investment just because they retain those rentcharges- para. 7 of Schedule 3 to the Trustee Act 2000 and see Reed and Wilson *op. cit.*, para. 4.15.

³⁷⁰ Section 5 and Schedule 1 of the Interpretation Act 1978.

owners, the restrictions on the number of trustees of trusts of land may preclude compliance with section 8(1) of the Trustee Act 2000.³⁷¹

Section 6(3) of the 1996 Act reversed *Re Power*³⁷² where it was held that an express power to invest as an absolute owner did not enable trustees to purchase land for occupation by beneficiaries. Section 17(1) of the 1996 Act stated that section 6(3) applies 'in relation to trustees of a trust of proceeds of sale of land as in relation to trustees of land' thus reversing the decision in *Re Wakeman*,³⁷³ where it was held that once all the land was sold, the trust for sale ceased and with it the power to invest. Section 17(3) of the 1996 Act defines a 'trust of proceeds of sale of land' as including not only proceeds of a disposition of land held in trust, but also any property representing such proceeds. Section 17(1) of the 1996 Act has been repealed by the Trustee Act 2000³⁷⁴ since the trustees of the proceeds of sale of land have power to buy land under Part III, so it is no longer necessary to treat them as if they were trustees of land and thus authorised under section 6(3) of the 1996 Act.

Section 8(1) of the Trustee Act 2000 states that, 'A trustee may acquire freehold or leasehold land in the United Kingdom- (a) as an investment, (b) for occupation by a beneficiary, or (c) for any other reason.' Subsection (1)(a) and (b) of section 8 may seem superfluous in the light of (c) which is widely drafted, yet are included to avoid any doubt that those two reasons are permissible.³⁷⁵ In the draft Bill attached to the Law Commission Report clause 4(1) substituted section 28(2) of the Law of Property Act 1925 to include the provision that trustees 'may purchase for any purpose they think fit.' This broadened the Law Commission's recommendation 'that trustees should have a broad power to apply some or all of any of the proceeds of sale to the purchase of land, either as an investment or for occupation by the beneficiaries.' The end result in section 8(1) is a combination of these two.

³⁷¹ See *Lewin on Trusts op. cit.*, para. 35-194F.

³⁷² [1947] Ch. 572.

³⁷³ [1945] Ch. 177. See, however, *Re Wellsted's Will Trusts* [1949] Ch. 296 at 319 where Cohen L.J. stated in relation to the decision of Uthwatt J. in *Re Wakeman* 'in what I have said on the construction of this section I desire to reserve the question of what the position would be if at the time when the question of investment arose no land was held upon the trusts of the settlement.'

³⁷⁴ See section 40(1) and Schedule 2 para. 48 of the Trustee Act 2000.

³⁷⁵ See Alastair Hudson *Equity and Trusts* (3rd edn 2003) para. 9.2.4.

Scope of investment

There is no definition of investment in the Act, thus leaving section 8(1)(a) of the Trustee Act 2000 (which enables trustees to acquire land as an investment) open to interpretation. Traditionally investment has been defined as income-producing assets³⁷⁶ defined by Lawrence J. in *Re Wragg* as ‘to apply money in the purchase of some property from which profit or interest is expected and which property is purchased in order to be held for the sake of the income which it will yield.’³⁷⁷ The result would be that non-income-producing assets such as antiques, works of art and premium bonds could not be purchased. This is why the purchase of a house for occupation by a beneficiary which produces no income was held not to be an investment in *Re Power*. Yet a closer analysis of the judgments of Lawrence J. in *Re Wragg* and Jenkins J. in *Re Power* reveals that the judges were not formulating rigid rules which they have subsequently been quoted as establishing.³⁷⁸

Lawrence J. in *Re Wragg* preceded his definition by stating that he was not giving ‘an exhaustive definition’ and that the definition he gave was merely ‘one of its meanings’,³⁷⁹ thus indicating that this was not the only meaning. Jenkins J. in *Re Power* stated in tentative and inconclusive language in reference to purchasing freehold property for occupation by a beneficiary that ‘it is not necessarily an investment, for it is purchase for some other purpose than the receipt of income.’³⁸⁰ The word ‘necessarily’ indicates that his statement is not definitive. Jenkins J. continued, ‘It may be a purchase which would not be, from the financial point of view, attractive or indeed at all beneficial, because part of the price might be attributable to the special benefit represented by the acquisition of a suitable place to live.’

³⁷⁶ See *Lewin on Trusts op. cit.*, paras. 35-11, 35-194G, 35-197, Reed and Wilson *op. cit.*, paras. 3.15-3.18 and Hanbury and Martin *op. cit.*, p. 532-533.

³⁷⁷ [1919] 2 Ch. 58 at 64-65. The decision in the case was that on the true construction of Clause 10 of the testator’s will, the trustees were authorised to invest the trust money in the purchase of real estate and that consequently they could effect a valid appropriation of the testator’s real estate in or towards satisfaction of the settled shares of the testator’s daughters in the residuary estate.

³⁷⁸ See Andrew Hicks *The Trustee Act 2000 and the modern meaning of ‘investment’* (2001) 15 T.L.I. 203 at 204-205.

³⁷⁹ *Op. cit.*, p. 64-65.

³⁸⁰ *Op. cit.*, p. 575.

This indicates that it will not be an investment if a higher price is paid in order to acquire premises in which to live, which requires an investigation into whether a premium was paid for this. Jenkins J. concluded his analysis by stating that, it ‘might not be a purchase by way of investment, inasmuch as part of the money would or might be paid for the advantage of vacant possession and the benefit the family would get by living in the house.’³⁸¹ This signifies that there may be an investment so long as part of the purchase price does not constitute the provision of an immediate dispositive benefit to the trust beneficiaries.³⁸² Jenkins J.’s indeterminate language diminishes the significance of *Re Power*.

Hicks argues that the traditional meaning of investment³⁸³ no longer persists in the law of trusts for a number of convincing reasons.³⁸⁴ There has been a recent proliferation of investments that do not produce income, but which may nevertheless enhance effective trust fund management³⁸⁵ and judicial authority shows that the legal meaning of investment has evolved to reflect these developments.³⁸⁶ In addition the special trust law considerations that historically conditioned a restrictive meaning of investment have no relevance today given contemporary economic conditions and increasingly sophisticated understandings of investment.³⁸⁷ Also the persistence of a restrictive meaning of investment would partially frustrate the policy behind the Trustee Act 2000.³⁸⁸

³⁸¹ *Op. cit.*, p. 575.

³⁸² See Hicks *op. cit.*, p. 205-206. Hicks concluded p. 206 that, ‘*Re Power* is a weak authority due not only to its ambiguity but also the historical context in which it was decided.’

³⁸³ To purchase an asset for the purpose of yielding income: see *op. cit.*, p. 203.

³⁸⁴ See *op. cit.*, p. 204.

³⁸⁵ A large number of financial instruments have emerged that do not yield an income but are of great potential benefit to trusts for other reasons, such as put options, futures, warrants, zero dividend preference shares: see Hicks *op. cit.*, p. 206-209.

³⁸⁶ For example *Marson v. Morton* [1986] 1 W.L.R. 1343 at 1350 per Browne-Wilkinson V.-C and *Cook v. Medway Housing Society Ltd* [1997] S.T.C. 90 at 98 per Lightman J.

³⁸⁷ An increased emphasis on capital growth is required in contemporary economic conditions to preserve the real value of the trust fund and maintain its capacity to produce a constant real income. In addition the modern portfolio theory judges the prudence of investments by reference to the total return (income and capital gain/loss) of the whole portfolio and the duty of even-handedness must be understood at this portfolio level: see Hicks *op. cit.*, p. 211. See also L.M. Clements *Bringing Trusts into the Twenty-First Century* [2004] 2 Web J.C.L.I. at 7-10.

³⁸⁸ It would arbitrarily restrict the range of assets available to trustees as investments and would perpetuate via the back door the very evil that the Trustee Act 2000 sought to avoid, namely a form of categorical restriction: see Hicks *op. cit.*, p. 212.

Due to the general uncertainty, express investment clauses state that the power applies whether the asset is income-producing or not. The Law Commission was of the view that, ‘The notion of what constitutes an investment is an evolving concept, to be interpreted by the courts. Today, there can be little doubt that “profit” can be in the form of capital appreciation rather than income yield. Trustees might, for example, legitimately invest (depending upon the circumstances of the trust) in antique silver or paintings in the expectation that they will increase in value.’³⁸⁹ The Law Commission then quoted from Sir Donald Nicholls V.-C. in *Harries v. Church Commissioners for England*³⁹⁰ who stated that ‘the purposes of the trust will be best served by the trustees seeking to obtain therefrom the maximum return, whether by way of income or capital growth, which is consistent with commercial prudence’.³⁹¹ The Charity Commission, however, takes a narrower view of investment and is of the view that commodities, works of art, premium bonds and derivatives are not investments.³⁹² It is to be regretted that the Trustee Act 2000 was not sufficiently comprehensive to forestall problems of such a restrictive interpretation arising.

Ambit of occupation and who is a beneficiary under section 8(1)(b)?

A close analysis of the wording of section 8(1)(b) of the Trustee Act 2000 reveals potentially problematic terminology. The view that it can be occupation for a business purpose³⁹³ is difficult to support, because the plain intention behind the original section 6(4) of the 1996 Act was occupation as a residence which although not specifically expressed, is the underlying theme of paragraphs 10.7 and 10.8 of the Law Commission Report. Occupation for business purposes will fall in (c) and in some cases (a) of section 8(1) and therefore it is questionable whether it is justifiable to distort the meaning of the word occupation to cover business use.

³⁸⁹ See para. 2.28 footnote 56 of Law Com. No. 260 and Explanatory Notes to the Trustee Act 2000 paras. 22 and 23. See also Underhill and Hayton *op. cit.*, p. 601-602.

³⁹⁰ [1992] 1 W.L.R. 1241 at 1246. See generally *Lewin on Trusts op. cit.*, paras. 35-194G, 35-147B, 35-152.

³⁹¹ See also *Cowan v. Scargill op. cit.*, at 287 per Megarry V.-C.

³⁹² Charity Commission *Operational Guidance Trustee Act 2000 General Power of Investment* para. 2 (OG 86 B1- 8 February 2002). Detailed guidance on derivatives is contained in paras. 3 and 4. Clements *op. cit.*, p. 6 distinguishes cases where there is only one category of beneficiary, interested in both the capital and the income, where there is no need to balance income against capital and in such cases a purchase which produces capital appreciation only would be an allowable investment.

³⁹³ See *Lewin on Trusts op. cit.*, para. 35-194H and Underhill and Hayton *op. cit.*, p. 610 who stress that the trustees need to ensure that they act fairly between income and capital beneficiaries in going ahead with such a proposed purchase.

The Act is silent on the categories of beneficiaries in whose favour the power can be exercised. Yet trustees cannot allow occupation by a remainderman, because section 8(1)(b) is an administrative power in aid of the beneficial interests and not a dispositive power, which allows the trustees to alter the beneficial interests or alter the balance between the life tenant and the remainderman.³⁹⁴ Allowing the remainderman to occupy is allowing the interest of that beneficiary to be brought into possession. In the normal situation land will be acquired for occupation by a beneficiary with a beneficial interest in possession. Sections 4 and 5 of the 2000 Act do not apply, yet trustees are bound by duties under the general law as well as the duty of care under section 1.

Since section 8(1)(b) does not stipulate that the beneficiary must have a beneficial interest in possession, the question arises whether trustees could exercise the power in favour of a beneficiary under an accumulation and maintenance trust or under a discretionary trust. It would be permissible for trustees to buy land for occupation by a beneficiary under an accumulation and maintenance trust out of trust capital, the income of which is eligible to be applied solely for the maintenance of that beneficiary who stands to take a beneficial interest in possession or absolute interest in the land acquired upon attaining some specified age.³⁹⁵

Arguably, section 8(1)(b) authorises trustees to purchase land for occupation by a beneficiary who is an object of a discretionary trust, though this is less clear since the acquisition would preclude the other objects of the discretionary trust from the opportunity of participating in the enjoyment of the land, so long as it was retained for the occupational purpose (unless the beneficiary for whom the land was acquired paid a full rent). To that extent the character of the beneficial interests would be altered by the acquisition.³⁹⁶ An alternative view is that trustees could purchase a house for

³⁹⁴ See *Lewin on Trusts op. cit.*, para. 35-194H and *Underhill and Hayton op. cit.*, p. 609.

³⁹⁵ This would accord with the requirements for accumulation and maintenance trusts in section 71(1) of the Inheritance Tax Act 1984. See *Lewin on Trusts op. cit.*, para. 35-194I and *Underhill and Hayton op. cit.*, p. 610.

³⁹⁶ *Lewin on Trusts op. cit.*, para. 35-194I.

occupation of a discretionary income beneficiary and his family and permit him a licence to live there which is revocable at the whim of the trustees.³⁹⁷

There is, however, a problem of supporting the view that section 8(1)(b) allows trustees to exercise the power in favour of a beneficiary under a discretionary trust and this focuses on the meaning of the term ‘beneficiary’. It is anomalous that the term ‘beneficiary’ is defined in the 1996 Act but not the 2000 Act, which once more exemplifies legislation without a coherent, all-embracing strategy or rushed together without the full implications being contemplated. The definition in the 1996 Act in section 22(1) is “‘beneficiary’, in relation to a trust, means any person who under the trust has an interest in property subject to the trust’ The test, therefore, is whether the person has ‘an interest in property subject to the trust.’

The House of Lords decided in *Gartside v. IRC*³⁹⁸ that beneficiaries of a discretionary trust do not enjoy an interest in trust assets. Lord Wilberforce stated, ‘no doubt in a certain sense a beneficiary under a discretionary trust has an “interest”: the nature of it may, sufficiently for the purpose, be spelt out by saying that he has a right to be considered as a potential recipient of benefit by the trustees and a right to have his interest protected by a court of equity. Certainly that is so, and when it is said that he has a right to have the trustees exercise their discretion “fairly” or “reasonably” or “properly” that indicates clearly enough that some objective consideration (not stated explicitly in declaring the discretionary trust, but latent in it) must be applied by the trustees and that the right is more than a mere *spes*. But that does not mean that he has an interest which is capable of being taxed by reference to its extent in the trust fund’s income: it may be a right with some degree of concreteness or solidity, which attracts the protection of a court of equity, yet it may still lack the necessary quality of

³⁹⁷ See Underhill and Hayton *op. cit.*, p. 609 who express the view that trustees may acquire a holiday home to be used from time to time by discretionary beneficiaries and their families. An interest in possession for inheritance tax purposes could be avoided by specifying that a discretionary beneficiary is to use the home only as a licensee and the practice is to use the home only for short periods that differ each year and are at different times of year each year. Note *Armitage v. Nurse* [1998] Ch. 241 at 261 where Millett L.J. held that time does not begin to run under section 21(3) of the Limitation Act 1980 for a beneficiary under a discretionary trust or power until the beneficiary is entitled to an interest in possession in the property (that is receives some trust funds) with the consequence that the liability of trustees of a discretionary trust is open-ended.

³⁹⁸ [1968] A.C. 553. See generally the discussion in Whitehouse and Hassall *op. cit.*, paras. 4.4-4.6.

definable extent which must exist before it can be taxed.’³⁹⁹ The decision is obviously confined to the taxation sphere but general principles can be derived from it and applied by analogy here.⁴⁰⁰

Even though beneficiaries under a discretionary trust can under the rule in *Saunders v. Vautier* join together and bring the trust to an end provided that they are *sui iuris*, this does not make them beneficiaries under the Act. It is notable that Whitehouse and Hassall⁴⁰¹ only consider the issue of whether discretionary beneficiaries have a sufficient interest in the trust property as being relevant to section 6(5), section 14 and sections 19 and 20 and argue that in all three contexts, it would be hard to justify excluding such a beneficiary.⁴⁰² Even though the Trustee Act 2000 does not define ‘beneficiary’,⁴⁰³ there is no justification for incorporating the definition in the 1996 Act, since the interpretation section, section 39, does not make provision for this. Schedule 1 of the Interpretation Act 1978 does not define beneficiary, so there is a lacuna which the judiciary will no doubt fill by adopting the definition from section 22 of the 1996 Act.

Any other reason under section 8(1)(c)

Section 8(1)(c) is the widely drafted sweeping-up provision under which trustees may acquire land for any reason other than investment or occupation by a beneficiary. Section 8(1)(c) will be important for charitable trusts to enable trustees to buy land⁴⁰⁴ and for non-charitable purpose trusts where land is acquired in the administration of the trust.⁴⁰⁵ Where there is a large trust running a substantial estate, section 8(1)(c) would cover land being acquired as premises from which the trust administration

³⁹⁹ *Op. cit.*, p. 617.

⁴⁰⁰ A distinction needs to be drawn between a beneficiary under a discretionary trust and the object of a power of appointment, the latter only having a hope or *spes*: *Re Brooks' Settlement Trusts* [1939] Ch. 993. Fiduciary or personal objects of a fiduciary power cannot be excluded from having any right to make the trustee account, though objects of a personal power can: *Rosewood Trust Ltd v. Schmidt* [2003] U.K.P.C. 26, [2003] 2 W.L.R. 1442.

⁴⁰¹ *Op. cit.*, paras. 4.7-4.8.

⁴⁰² Underhill and Hayton *op. cit.*, p. 610 argue that a beneficiary under a discretionary trust does have a proprietary interest of sorts: *Knocker v. Youle* [1986] 2 All E.R. 914, *Re Smith* [1928] Ch. 915.

⁴⁰³ Section 35(2)(b) and (c) are limited to the context of personal representatives and are not definitive.

⁴⁰⁴ The Lord Chancellor confirmed that it would include the purchase of functional land by charitable trustees for carrying out the purposes of the charity, for example, a school buying land to serve as a playing field: see H.L. Debs., Vol. 613, col. CWH3, 7 June 2000.

⁴⁰⁵ See *Lewin on Trusts op. cit.*, para. 35-194K.

could be carried on. Section 8(1)(c) clearly covers the case of land being purchased for the beneficiary to run a business from, but will not cover trustees acquiring land to carry on a business run by the trustees as opposed to by the beneficiaries.

Inter-relationship of section 6(1) of the 1996 Act and section 8(3) of the Trustee Act 2000

The question arises whether section 8(3) of the 2000 Act is wider than section 6(1) of the 1996 Act.⁴⁰⁶ Section 8(3) of the 2000 Act provides that, 'For the purpose of exercising his functions as a trustee, a trustee who acquires land under this section has all the powers of an absolute owner in relation to the land.' Section 6(1) of the 1996 Act only becomes operative once land has been acquired and the trustees have become trustees of land. There are differing views as to whether section 6(1) authorises trustees who are not trustees of land to mortgage the land for the purpose of acquiring it,⁴⁰⁷ and whether trustees are authorised to borrow money for the purpose of acquiring land under section 16 of the Trustee Act 1925.⁴⁰⁸

Since section 8(3) of the 2000 Act does not require the trustees already to be trustees of land when they exercise their powers under the subsection, and uses the present tense, trustees will have power to buy land with the aid of a mortgage when acquired for any of the reasons given in section 8(1).⁴⁰⁹ This is correct in so far as section 6(1) of the 1996 Act is limited to trustees who are trustees of land, yet it is clearly arguable that since section 6(3) of the 1996 Act states that, 'The trustees of land have power to

⁴⁰⁶ *Lewin on Trusts op. cit.*, para. 35-194L.

⁴⁰⁷ *Lewin on Trusts op. cit.*, para. 35-194L takes the view that section 6(1) does not authorise trustees to mortgage land to acquire it and discusses by way of comparison in footnote 93 *Abbey National Building Society v. Cann* [1991] 1 A.C. 56 in which the House of Lords exploded the theory that there was a *scintilla temporis* between acquisition of the legal estate in land and the grant of the mortgage financing the acquisition: both are one indivisible transaction. It is interesting that *Lewin on Trusts* draws upon this case by way of comparison when the case actually supports the proposition that they are stating, because if there were a *scintilla temporis*, then the trustees would arguably have the power under the 1996 Act. This stance should be contrasted with the view of Underhill and Hayton *op. cit.*, p. 608 who argue rightly that due to *Cann*, trustees of land or just of movables can purchase land by way of mortgage over that land, but they cannot create a liability by mortgaging other trust property to generate money to be used in the acquisition of further investments.

⁴⁰⁸ Where trustees are authorised to pay or apply capital money subject to the trust for any purpose or in any manner, they have power to raise such money by sale, mortgage etc. of the trust property for the time being in possession. It does not enable trustees to raise money on the security of the trust property for the purpose of acquiring further land by way of investment: *Re Suenson-Taylor* [1974] 1 W.L.R. 1280.

⁴⁰⁹ See also Hayton and Marshall *op. cit.*, para. 9-124 and the Law Com. No. 260 para. 2.44.

acquire land under the power conferred by section 8 of the Trustee Act 2000', that a trustee of land is covered by the wording of section 8(3) of the 2000 Act and such a trustee is enabled by the present tense wording of section 8(3) to buy land with the aid of a mortgage. A trustee of land is therefore not disadvantaged or restricted by section 6(1) of the 1996 Act.

It is worth noting that for the purposes of section 6(1) of the 1996 Act, it makes no difference how the land came into the trust: it could have been acquired by trustees under section 8 of the Trustee Act 2000 or it could have been gifted by the settlor, whereas section 8(3) of the Trustee Act 2000 only applies to land acquired by a trustee, which does not apply where land is gifted to the trust. Whitehouse and Hassall argue that it does not matter that section 8(3) does not apply where land is gifted to the trust given that the trust in such a case will be a trust of land and hence the trustees will have the section 6(1) powers.⁴¹⁰ They contend that when land is acquired under section 8, the trustees become trustees of land and hence have the section 6(1) powers of an absolute owner. They argue that it would, therefore, seem that the powers given in section 8(3) are wholly redundant. The problem with that argument is that section 8 of the 2000 Act has been enacted to be self-contained and independent of section 6 of the 1996 Act. There is inevitably overlap between section 6 of the 1996 Act and section 8 of the 2000 Act, which demonstrates yet again that the legislation has been enacted piecemeal rather than as an assimilated comprehensive whole.

Personalty and land are in any case dealt with separately in the 2000 Act. The general power of investment in section 3 of the 2000 Act might have been widened to include the acquisition of land⁴¹¹ in order to achieve uniformity. The principal reason the Law Commission gave for structuring the Bill in this way was to facilitate consequential amendments to the investment powers of some bodies who, though not trustees, are presently subject to the provisions of the Trustee Investments Act 1961.⁴¹² It seems unfortunate that short-term gains of promoting consequential amendments should have forestalled long-term gains of homogeneity of investment powers.

⁴¹⁰ *Op. cit.*, para. 11.73.

⁴¹¹ See Whitehouse and Hassall *op. cit.*, para. 11.75.

⁴¹² Law Com. No. 260 para. 2.41 footnote 86 and para. 2.23.

A further reason given was that a wide power of investment which would include land may not give trustees power to purchase land for occupation by a beneficiary and would not permit them to do so for other reasons.⁴¹³ This obstacle could have been overcome by express provision. A more convincing explanation is that the law has traditionally dealt with personalty and land under different statutory regimes and to continue to deal with them independently is to continue along the same path as the law has been treading. The Trustee Act 2000 should have been bold and assimilated the provisions of the 1996 Act into the 2000 Act.

Utility of the duty of care

The duty of care when exercising the powers conferred by section 6 was inserted into section 6 as the new subsection (9) by the Trustee Act 2000.⁴¹⁴ Section 6(9) of the 1996 Act states that, 'The duty of care under section 1 of the Trustee Act 2000 applies to trustees of land when exercising the powers conferred by this section.' It is odd that the duty of care under section 6(9) is misleadingly omitted from the list in the Trustee Act 2000, Schedule 1, whereas other legislation, such as the amendments to section 22(1) or (3) of the Trustee Act 1925 are included. This can only be an oversight.⁴¹⁵ There is no rationale for the omission since the amendments to section 22(1) or (3) of the Trustee Act 1925 are contained in the First⁴¹⁶ and Second⁴¹⁷ Schedules.

Section 6(9) is a worthy addition, since it adds an extra necessary dimension to limit the increased powers of trustees contained in section 6(1).⁴¹⁸ The duty of care seems to codify the general equitable duty of care, as was intended by the Law Commission,⁴¹⁹ though the duty of care had not been laid down with precision.⁴²⁰

⁴¹³ See para. 2.41.

⁴¹⁴ Section 40(1) and Schedule 2 para. 45(3).

⁴¹⁵ See *Lewin on Trusts op. cit.*, para. 37-20A and *Whitehouse and Hassall op. cit.*, para. 2.54 footnote 1.

⁴¹⁶ Schedule 1 para. 6.

⁴¹⁷ Section 40(1) and Schedule 2 para. 22.

⁴¹⁸ In Law Com. No. 260 the Law Commission recognised in para. 3.8 that 'in devising a scheme to confer wider administrative powers on trustees, an appropriate balance must be struck between extending the powers which trustees have as a matter of law, and the imposition of safeguards in an attempt to ensure that they act properly in exercising those powers.'

⁴¹⁹ See Law Com. No. 260 para. 2.35.

⁴²⁰ The general duty was to take the care of an ordinary prudent businessman in managing his own affairs- see *Underhill and Hayton op. cit.*, p. 576-577: *Brice v. Stokes* (1805) 11 Ves. 319, *Massey v. Banner* (1820) 1 Jac. & W. 241, *Bullock v. Bullock* (1886) 56 L.J. Ch. 221, *Speight v. Gaunt* (1883) 22

Whether a trustee has exercised such care and skill as is reasonable in the circumstances⁴²¹ will be a question of fact to be determined in each case.

Can the power of sale be excluded under section 8(1)?

Significance of excluding the power of sale

Section 8(1) of the 1996 Act provides that, 'Sections 6 and 7 do not apply in the case of a trust of land created by a disposition in so far as provision to the effect that they do not apply is made by the disposition.' A major issue raised by section 8 is whether the power of sale can be excluded and whether the 'dead hand' of the settlor can take hold. As Watt states in *Escaping Section 8(1) Provisions in 'New Style' Trusts of Land*,⁴²² section 8(1) is stated in stark, unqualified terms and was anticipated to have a radical impact, so much so that Parliament felt it necessary to limit its effect to private trusts of land.⁴²³

It is extraordinary that this provision conferring on settlors a powerful new dispositive facility is reminiscent of the position which existed until the latter part of the last century when the 'dead hand' of the settlor rested heavily on the owners of traditional family settlements.⁴²⁴ To assuage those concerned about the prevention of the creation of new strict settlements, the Law Commission goes to great lengths to re-assure that settlors will be able to use the new provisions to ensure that the trust powers are vested in the life tenant by delegation to achieve much the same result as that which flowed automatically from the constitution of a strict settlement.⁴²⁵

Ch. D. 727 at 736 and 754 affirmed (1883) 9 App. Cas. 1 at 19 per Lord Blackburn. A paid trustee was expected to exercise a higher standard of diligence and knowledge than an unpaid trustee: *Re Waterman's Will Trusts* [1952] 2 All E.R. 1054 at 1055, *National Trustees Co. of Australasia v. General Finance Co. of Australasia* [1905] A.C. 373 at 381. As for a corporate professional trustee, see *Bartlett v. Barclays Bank Trust Co. Ltd* [1980] Ch. 515 at 534. See also Hudson *op. cit.*, paras. 9.3.3-9.3.6 who categorises the trustee's general duties of investment into three core principles: to act prudently and safely- *Learoyd v. Whiteley* (1887) 12 App. Cas. 727, to act fairly between beneficiaries- *Bartlett v. Barclays Bank*, *Nestlé v. National Westminster Bank*, and to do the best for the beneficiaries financially- *Cowan v. Scargill*.

⁴²¹ For a detailed analysis of the duty imposed by section 1 of the 2000 Act, see Reed and Wilson *op. cit.*, paras. 2.3-2.9 and Whitehouse and Hassall *op. cit.*, paras. 10.17-10.19.

⁴²² Gary Watt [1997] Conv. 263 at 264-265.

⁴²³ Section 8(3) disapplies section 8(1) in the case of charitable, ecclesiastical and public trusts.

⁴²⁴ Eventually economic and fiscal imperatives led to the enactment of the Settled Land Acts 1882 and 1925 as a result of which the grip of the dead hand was almost utterly cast off: see Watt *op. cit.*, p. 263. See also John H. Langbein *Mandatory Rules in the Law of Trusts* (2004) 98 Northwestern U.L.R. 1105 at 1107-1119.

⁴²⁵ Law Com. No. 181 para. 10.2.

Yet the Law Commission goes further than this by offering what it presents as an added bonus that the new system will in addition enable settlors to set limits on the exercise of the trustees' powers. There is no rationale given nor justification offered and no exploration of the issues involved in this change.⁴²⁶ It is contrary to the statutory policy of unrestricted alienation by the tenant for life under a strict settlement⁴²⁷ and indirect restriction on trustees for sale.⁴²⁸

The reason for it seems to be that in trying to find the best solution, the Law Commission endeavours to ascertain the best features of strict settlements and trusts for sale rather than inaugurate a modern, novel approach untainted by past mistakes. The Law Commission determines that, 'Thus, under the new system, settlors will be able to construct a settlement which, while giving an occupying beneficiary powers analogous to a tenant for life under a strict settlement, also inhibits (if they so wish) that beneficiary's powers of disposition.'⁴²⁹ Whilst this may be a worthwhile objective in itself, it does not justify the original aim of enabling settlors to set limits on the exercise of trustees' powers and confuses the strictly separate issues of limiting trustees' powers and limiting beneficiaries' powers.

The answer is purportedly given in the Law Commission Working Paper where the Law Commission stated that, 'The question that then arises is whether a settlor should be able to limit the powers of the trustee. Is it essential that there should be someone with an unfettered power of sale? We doubt if the conditions which gave rise to this being a matter of such importance in the past still exist today, and we therefore very much doubt whether any such provision is necessary provided that the position of purchasers is protected.'⁴³⁰ This superficial, perfunctory gloss is unworthy and unbefitting the importance of the provision and the significance it has in the annals of land and trusts law by failing to discuss the policy and substantive issues involved. It

⁴²⁶ In para. 10.10 the Law Commission stated that, 'There may of course be some express limitation of these powers, either by way of provisions subjecting their exercise to the consent of some person or persons, or by way of express restrictions in the trust instrument.' Again there is no discussion of the philosophy underlying such a provision and the remainder of the paragraph deals with whether purchasers are affected by such a provision.

⁴²⁷ Section 106 of the Settled Land Act 1925.

⁴²⁸ Section 26(1) and (3) of the Law of Property Act 1925.

⁴²⁹ Law Com. No. 181 para. 10.2.

⁴³⁰ No. 94 para. 7.5.

also contradicts the accurate innate instinct of the Law Commission at the beginning of the Report when it stated that, ‘It is important that any reform should retain the advantage of the present system, that there is always someone who can deal with the land.’⁴³¹

The view of *Emmet and Farrand on Title* is that, ‘It should be appreciated that the possibilities of exclusion and restriction represent very significant reforms. The policy objectives of the 1925 property legislation, particularly of the SLA 1925, included ensuring that there should always be an estate owner “who shall be in a position to carry out all usual and proper transactions for value, by way of sale, mortgage, lease or otherwise” (Wolstenholme and Cherry, *Conveyancing Statutes* 13th ed.), vol 3 p1.’⁴³² Sexton aptly states that, ‘Courtesy of the Law Commission he⁴³³ will have achieved, in the late twentieth century, the great ambition of every pre-1882 settlor of land. He will have rendered the land (for the duration of the trust) inalienable.’⁴³⁴

Methods of circumventing exclusion of power of sale

Watt explores methods of escaping the grip of the dead hand. He dismisses the possibility of an application under section 14, since section 14 does not appear to authorise the court to make an order relating to the exercise by trustees of functions which have been removed by a section 8(1) clause, because such functions would thereby fail to qualify as ‘their functions’ as those words are used in section 14.

Watt’s view is misconceived for two reasons. First, the trustees’ function is to hold title to land. The wording of section 8(1) does not *per se* remove the power of disposal as one of the functions; it merely eliminates it as one of their powers.⁴³⁵ Even

⁴³¹ *Ibid.*, para. 1.5.

⁴³² *Op. cit.*, R. 45 para. 22.029.

⁴³³ Referring to the settlor.

⁴³⁴ *The Law Commission’s report on trusts of land, at last a law for contemporary society? op. cit.*, p. 71.

⁴³⁵ This is supported by the view of Megarry and Wade *op. cit.*, para. 8-137 footnote 8 that the Act distinguishes between the trustees’ ‘functions’ and their ‘powers’, the former including the entirety of the trustees’ powers and obligations and is therefore much wider than the latter. The trustees’ functions include their paramount duty to act in the best interests of the beneficiaries and to further the purposes of the trust (*Cowan v. Scargill op. cit.*, at 286, 287, *Harries v. Church Commissioners for England op. cit.*, at 1246) and their duty to maintain an even hand between life tenant and remainderman. The exclusion of all or some of the trustees’ powers will not therefore deprive them of all their functions

though the trustees do not have the power to sell, it still remains within the ambit of their functions, albeit one which they do not have the power to carry out. Thus a court has jurisdiction under section 14(2)(a) to make an order relating to the power which may have been excluded under section 8(1). If this reasoning is wrong, then the counter-argument is that section 14 gives the court jurisdiction to make an order even where the particular function has been excluded under section 8(1), because the wording of section 14(2)(a), which states ‘any of their functions’, is wide enough to cover excluded functions.

The second related reason is one which Watt suggests and then dismisses,⁴³⁶ which is that the express inclusion of orders freeing trustees from section 8(2) consent clauses within the ambit of section 14 could be read as authorising the court generally to make orders relating to functions which have been taken away by the settlor. This argument has to be correct, because section 14 would otherwise have been expressly extended to section 8(1). Yet Watt’s view is that the more logical and natural statutory interpretation, by extension of the rule *expressio unius exclusio alterius*,⁴³⁷ is to read the express inclusion of orders relating to section 8(2) clauses as implicitly excluding the court’s authority to make orders relating to the potentially far more inhibiting (from the applicant’s point of view) section 8(1) clauses. The extension of this maxim, however, is unwarranted, since there is no justification for doing so on the wording of section 14(2)(a). In fact the express inclusion of orders relating to section 8(2) clauses raises an *a priori* assumption that the court has jurisdiction to make orders relating to powers removed by section 8(1), because there is no indication to the contrary in section 14(2).⁴³⁸

Watt then examines by what other means trustees and beneficiaries might escape the effect of a section 8(1) provision. He examines various options,⁴³⁹ only one of which

and in particular it will not affect their fundamental duties. They should therefore be able to seek the assistance of the court to the extent that the exclusion impedes their performance of any such duty: see Megarry and Wade *op. cit.*, para. 8-144.

⁴³⁶ *Op. cit.*, p. 266.

⁴³⁷ Express mention of one thing is the exclusion of the other.

⁴³⁸ It is notable that section 14(3) states explicitly that the court may not under section 14 make an order as to the appointment or removal of trustees.

⁴³⁹ *Op. cit.*, p. 266-271.

is examined here.⁴⁴⁰ Watt's first option is to plead that the trust of land has been rendered void *ab initio* under the rule against inalienability of capital. This would rarely be successful, as Watt recognises, since it would not apply to the simple case of a settlor excluding the power of sale for the lifetime of the beneficiary or beneficiaries with an interest currently in possession. The section 8(1) provision can easily be drafted such as not to infringe the rule against inalienability.⁴⁴¹ The Law Commission was wise enough in 1998 to 'accept the continuing need for a rule against perpetuities to provide a means of "dead hand control"',⁴⁴² though it expressly excluded the rule against alienability from the Consultation Paper.⁴⁴³

It is notable that Watt does not discuss the issue that a restraint on alienation *per se* is contrary to public policy. In accordance with the cardinal principle that the power of alienation is necessarily and inseparably incidental to ownership, if an absolute interest is given to a donee, any restriction which substantially takes that power away is void as being repugnant to the very conception of ownership.⁴⁴⁴ *Emmet and Farrand on Title* states that an exclusion of a trustees' power to sell or otherwise dispose of the land under section 8(1) might arguably still be void despite section 8(1) as a restraint upon alienation contrary to public policy.⁴⁴⁵

Hopkins argues that, 'The Act enables the settlor of an express trust to prevent a sale, by removing the power of sale',⁴⁴⁶ but Sydenham's view⁴⁴⁷ is that Hopkins is wrong, since it is contrary to public policy to make land inalienable. Hopkins replies⁴⁴⁸ that to avoid the conclusion that the Act makes it possible for land to be made inalienable requires the general principle of land law prohibiting this to be used as a tool of

⁴⁴⁰ The other options are by court order under *Chapman v. Chapman* [1954] A.C. 429, court order under section 53 of the Trustee Act 1925, under the rule in *Saunders v. Vautier*, variation under the Variation of Trusts Act 1958 and court order under the court's inherent jurisdiction to vary trusts in cases of emergency.

⁴⁴¹ See generally Megarry and Wade *op. cit.*, paras. 7-137-7-151.

⁴⁴² Law Com. No. 251 para. 1.19. The Law Commission proposed that there would be one fixed perpetuity period of 125 years with no lives in being, during which the 'wait and see' period will operate. See generally Sparkes *op. cit.*

⁴⁴³ Paras. 1.14 and 8.35-8.36.

⁴⁴⁴ See Cheshire and Burn *op. cit.*, p. 367-368, Megarry and Wade *op. cit.*, para. 3-071 and Gray and Gray *op. cit.*, p. 299-301.

⁴⁴⁵ *Op. cit.*, R. 45 para. 22.029.

⁴⁴⁶ *The Trusts of Land and Appointment of Trustees Act 1996 op. cit.*, at 414.

⁴⁴⁷ *Letters* [1997] Conv. 242 *op. cit.*

⁴⁴⁸ *Letters* [1997] Conv. 243 *op. cit.*

statutory interpretation. As a rule of interpretation, it would be subject to a statutory provision to the contrary. In his view the Settled Land Act embodies the public policy rule whereas the 1996 Act expressly confers on settlors the ability to restrict the trustees' powers. Hopkins concludes that 'the long title of the 1996 Act is "an Act to make *new provisions* about trusts of land including provisions *phasing out the Settled Land Act*" (emphasis added). Therefore, a rule of public policy embodied in the Settled Land Act should not be regarded as having survived unscathed.' The answer is that the status of the rule of public policy is uncertain.

Gray and Gray take a different perspective. They recognise⁴⁴⁹ in a general discussion on restrictions on alienation that some sort of compromise has to be struck between the policy concern to promote the commerciability of land and the countervailing impulse to permit personal control over discretionary distributions of privately held property.⁴⁵⁰ Their view is that, 'It remains to be seen whether even this compromise can survive the advent of European scrutiny. The European Convention for the Protection of Human Rights and Fundamental Freedoms guarantees the entitlement to "peaceful enjoyment of possessions",⁴⁵¹ and the European Court of Human Rights has emphasised that "the right to dispose of one's property constitutes a traditional and fundamental aspect of the right of property"⁴⁵² This jurisdiction thus enhances the prospects of subjecting the section 8(1) provision to greater scrutiny and of invalidating the restriction on the power of alienation.

Conclusion

Sections 6 and 8 represent in principle and on the whole an expedient reform, though the lack of a cogent policy covering land and personalty together with unco-ordinated and patchy legislation reflect statutory provisions which do not fulfil their potential. Section 6(1) should be drafted to omit the words 'For the purpose of exercising their powers as trustees' and section 6(5), (6) and (8) should be omitted. It was a retrograde step to allow the possibility of the power of sale being excluded under section 8 and

⁴⁴⁹ *Op. cit.*, p. 300-301.

⁴⁵⁰ *In the estate of Dunne* [1988] I.R. 155 is a more recent example of the Irish High Court striking down a prohibition partly on the ground that it perpetuated old family divisions as contrary to public policy.

⁴⁵¹ Article 1 of the First Protocol.

⁴⁵² *Marckx v. Belgium* (1979) 2 E.H.R.R. 330 para. 63.

section 8(1) should be drafted to state expressly that a power of sale cannot be excluded, but must be vested in the trustees or some other ascertained person.

CHAPTER 7- DELEGATION: DEFICIENT, FLAWED PROVISIONS OR REQUISITE, INEVITABLE COMPROMISE?

DO SOLICITORS CONSIDER IT DISADVANTAGEOUS THAT THE PERSON PREVIOUSLY IN THE POSITION OF A TENANT FOR LIFE OR STATUTORY OWNER HAS NO POWERS UNLESS DELEGATED TO HIM?

14 solicitors⁴⁵³ stated that it was not disadvantageous that the person previously in the position of a tenant for life or statutory owner has no powers unless they are delegated to him.

3 solicitors⁴⁵⁴ stated that it was disadvantageous that the person previously in the position of a tenant for life or statutory owner has no powers unless they are delegated to him.

The relief evident amongst the majority of those solicitors, that the person previously in the position of the tenant for life would have no powers unless they were delegated to him, was typified by the view of Roderick Steen (May, May and Merrimans) who stated that, *'It is much better for trustees to have the powers rather than the tenant for life. If you are going to abolish the Settled Land Act, then you must have powers vested in trustees.'*

Even amongst the minority, there was the realisation that the delegation provisions will rarely be used, as was expressed by John Glasson (Eversheds) who asserted that, *'I doubt whether the idea that the Settled Land Act position can be replicated by delegating powers to the tenant for life will come to much.'*

DO SOLICITORS CONSIDER IT A PROBLEM THAT THE DELEGATION IS REVOCABLE?

16 solicitors stated that it was not a problem that delegation is revocable.

1 solicitor⁴⁵⁵ stated that it was a problem that delegation is revocable.

⁴⁵³ Allen and Overy, Boodle Hatfield, Burges Salmon, Charles Russell, Currey and Co, Farrer and Co, Herbert Smith, Linklaters and Alliance, Macfarlanes, May, May and Merrimans, Official Solicitor, Payne Hicks Beach, Public Trust Office, Withers.

⁴⁵⁴ Eversheds, Speechly Bircham and Wiggin and Co.

It was illuminating to discover that this provision was introduced by Chris Jarman (Payne Hicks Beach) who explained that, *'I got that into section 9. When the Bill was introduced, I got a copy and thought there are problems here so I wrote to the Lord Chancellor's Department and copied the letter to one or two people including the Law Society Land Law and Succession Committee. I got a call from Donald Lockhart at Farrers who was on that Committee and he said will you come to a meeting with the Lord Chancellor's Department about it. So I drafted amendments including the area of appointment and removal of trustees.'* The system would have been highly problematic for the trustees if the powers had been irrevocable and the solicitors consulted were almost unanimous in welcoming the fact that the powers were revocable.

Do the delegation provisions reproduce the functional equivalent of a strict settlement?

Section 9 replaces the powers of a tenant for life under the Settled Land Act 1925⁴⁵⁶ and the powers of delegation of trustees for sale under section 29 of the Law of Property Act 1925⁴⁵⁷ and adopts what may superficially be regarded as a compromise position between the two. Section 29⁴⁵⁸ was narrower than the current section 9, since it was limited to revocably delegating powers of leasing, accepting surrenders of leases and management to any person of full age for the time being beneficially entitled to the net rents and profits of the land during his life or for any less period. This did not enable the power of sale to be delegated.

The Law Commission's recommendations

The view of the Law Commission was that 'it might be considered appropriate that the current occupier of the land, being uniquely placed to do so, should have

⁴⁵⁵ Speechly Bircham.

⁴⁵⁶ See Cheshire and Burn *op. cit.*, p.197-208, Megarry and Wade *op. cit.*, paras. 8-013-8-014, 8-071-8-106 and a more detailed analysis in Megarry and Wade (5th edn) *op. cit.*, p. 358-384.

⁴⁵⁷ See Megarry and Wade *op. cit.*, para. 8-116, Cheshire and Burn *op. cit.*, p. 221. Section 29 has been repealed by section 25(2) and Schedule 4 of the 1996 Act.

⁴⁵⁸ Section 29 provided that, 'The powers of and incidental to leasing, accepting surrenders of leases and management, conferred on trustees for sale whether by this Act or otherwise, may, until sale of the land, be revocably delegated from time to time, by writing, signed by them, to any person of full age (not merely being an annuitant) for the time being beneficially entitled in possession to the net rents and profits of the land during his life or for any less period

responsibility for the overall maintenance of the property, or for the collection of rents. We consider that these facilities should, in substance, continue to be available; settlors should be allowed to place control of the trust in the hands of those beneficiaries who are most directly interested in the trust land.’⁴⁵⁹ ‘Our recommendation as to the delegation of trust powers will enable settlors to go beyond the delegation provisions of the trust for sale. They will be able to construct what would in effect be an “enhanced” strict settlement. Such a settlement would not be precisely the same as a strict settlement because the trustees will retain the legal title.’⁴⁶⁰ ‘Should they wish to do so, settlors will be able to use the provisions of the new system to ensure that the trust powers are vested in the life tenant; it will, in other words, be possible by expressly directing that there should be a particular delegation, to achieve much the same result as that which at present flows automatically from the constitution of a strict settlement.’⁴⁶¹

The Lord Chancellor, Lord Mackay, at the House of Lords Committee Stage, stated that the new clause will ‘enable those who think it appropriate to do so to reproduce the functional equivalent of a strict settlement’.⁴⁶² These statements are at odds with the recommendation of the Law Commission at the end of the Report⁴⁶³ that delegation should be under section 25 of the Trustee Act 1925 by way of power of attorney to any beneficiary with a present, vested interest, and at odds with Clause 5 of the Bill attached to the Law Commission Report.⁴⁶⁴ The draft clause was substantially amended in its passage through Parliament at the House of Lords Committee Stage,⁴⁶⁵ Report Stage⁴⁶⁶ and Third Reading⁴⁶⁷ due to criticisms of the original provisions, yet section 9 does not unequivocally achieve the projected aims.

⁴⁵⁹ Law Com. No. 181 para. 4.5.

⁴⁶⁰ Law Com. No. 181 para. 4.11.

⁴⁶¹ Law Com. No. 181 para. 10.2.

⁴⁶² H.L. Debs., Vol. 570, col. 1535.

⁴⁶³ *Op. cit.*, para. 20.3.

⁴⁶⁴ Clause 5(1) stated that, ‘For section 29 of the Law of Property Act 1925 (delegation of powers of management by trustees for sale) there shall be substituted- The power conferred by section 25(1) of the Trustee Act 1925 (delegation by trustees by power of attorney for period not exceeding 12 months) may be exercised by a trustee of land so as to delegate any functions as respects land subject to the trust for an indefinite period if every donee of the power of attorney is a person of full age with a vested interest in possession in the land (other than a mere annuitant).’

⁴⁶⁵ *Op. cit.*, Vol. 570, cols. 1535-1540. When the Lord Chancellor introduced a new clause 9, the main areas of concern were the liability of trustees for the acts and defaults of a beneficiary to whom trustees

The power to delegate

Section 9(1) provides that, ‘The trustees of land may, by power of attorney, delegate to any beneficiary or beneficiaries of full age and beneficially entitled to an interest in possession in land subject to the trust any of their functions as trustees which relate to the land.’ Thus a life tenant under a trust of land has no automatic powers and will only obtain the powers that the tenant for life had as of right under the Settled Land Act 1925 where the trustees, retaining the legal estate, decide to delegate and the delegation is revocable. As Barraclough and Matthews articulate, ‘The life tenant will never be sure that the authority the trustees have given him with one hand, will not be removed by the other. A delegated power to sell may be removed at the moment the tenant for life wishes to use it. The trustees can regain the initiative. It is the façade of power which they delegate, not the reality.’⁴⁶⁸ This cynical view contains a modicum of legitimacy, though each case will depend on the particular trust itself.

Section 9 is not a functional equivalent of a strict settlement, because delegation is at the trustees’ discretion, unlike the position of the tenant for life under a strict settlement. If trustees refuse to delegate to a life tenant, a life tenant may apply to the court under section 14 of the 1996 Act and the intentions of the settlor will be one relevant consideration under section 15(1)(a) which the court will take into account. The best solution to fortify the position of the life tenant is for section 8(1) to exclude the power of disposition from the trustees’ powers and for the disposition expressly to grant this power to the life tenant or the settlor, thus circumventing the need to rely on section 9(1).

Can a settlor compel trustees to delegate to a beneficiary?

The issue arises of whether a settlor can make express provision to compel trustees to delegate to a beneficiary rather than relying on the trustees’ discretion. If a settlor cannot compel trustees to delegate to the life tenant, then the Law Commission’s

have delegated any of their functions and the circumstances in which delegation of functions by trustees to a beneficiary will automatically be revoked.

⁴⁶⁶ *Op. cit.*, Vol. 571, cols. 958-961. The amendments concerned protection for third parties, revocation of the power of attorney and the standard of care to be observed by trustees in deciding whether to delegate any of their functions.

⁴⁶⁷ *Op. cit.*, Vol. 572, cols. 93-95.

⁴⁶⁸ *Op. cit.*, para. 6.1.

objectives have potentially remained unfulfilled, offering little consolation to those settlors aspiring to mimic the structure of the Settled Land Act who are unwilling to utilise section 8(1). Compulsory delegation is problematic from two perspectives: first, section 8 (exclusion and restriction of powers) does not apply to section 9⁴⁶⁹ and secondly, section 9 does not state that it applies unless there is a contrary intention.

Concerning the first problem that there is no provision permitting settlors to exclude or restrict the power of delegation, it can be argued that it is irrelevant that section 8 does not apply, because the settlor does not want to exclude or restrict the power under section 9, but wants to extend it by making it mandatory for the trustees to delegate. This then leaves the second problem of whether section 9 is subject to a contrary intention. Section 9 is not subject to a contrary intention, thus it may be arguable that it cannot be altered by express provision. An express provision in a trust instrument requiring trustees to delegate to a particular beneficiary will thus *prima facie* be invalid. This curtailment of the freedom of the settlor to structure the trust as he wishes can be justified on the grounds of conforming with general principles of delegation to trustees and not according priority to the wishes of the settlor, which are only be taken into account under section 15(1)(a).

The argument against this view is that the absence of a contrary intention merely indicates that this power cannot be excluded. The absence of a contrary intention indicates nothing about the power being extended, so that it is feasible for it to be mandatory for trustees to delegate. An express clause stating that trustees of land shall delegate to a specified beneficiary should, therefore, in principle be valid. An alternative argument is that there is no provision in section 9 comparable to that which exists in section 4, which specifically states that the power to postpone is to be implied 'despite any provision to the contrary made by the disposition.'⁴⁷⁰ The absence of such express stipulation in section 9 may be argued to indicate that contrary provision may be made.

⁴⁶⁹ Compare the power to delegate under the Trustee Act 1925 which could be excluded by the settlor in section 69(2).

⁴⁷⁰ See *Emmet and Farrand on Title op. cit.*, R. 45 para. 22.027.

A further suggestion is made by Barraclough and Matthews, who suggest that one possible course would be to use the power under section 8 of restricting and negating section 6 absolute owner powers by providing that they were only to be exercised while a section 9 delegation is in force.⁴⁷¹ Barraclough and Matthews recognise that this may be inherently self-defeating, because ‘In terms as simple and drastic as that the direction could stultify the settlement- there might for example be no beneficiary eligible as an attorney. But in addition the powers of trustees are to delegate “any of their functions as trustees”. They could hardly delegate powers which had been removed from their own competence to exercise.’

The problem with Barraclough and Matthews’ first counter-argument, that there might be no beneficiary eligible as an attorney, is that a section 9 delegation in such terms will only work where it is in favour of a specific named beneficiary. There must be a *prima facie* assumption that the designated beneficiary is competent and able to deal with the delegation of powers, otherwise a settlor would not contemplate such a delegation. Professional draftsmen will have to draft any such clause with scrupulous care to ensure that a named beneficiary is to be the particular delegate and insert provisions to cover any contingency of that beneficiary being unable or unwilling to act, so that there is no lacuna. For Barraclough and Matthews to defeat that argument, on the basis of there being no suitable beneficiary, is to fail to anticipate the subtleties of precise drafting.

The problems with Barraclough and Matthews’ second argument, that trustees could hardly delegate powers which had been removed from their own competence to exercise, are manifold. The appropriateness of the term ‘competence’ is questionable in such a context, the word ‘ambit’ being infinitely preferable. Additionally competence to exercise is irrelevant to the question of whether the powers remain their functions. The powers remain within the trustees’ functions, since they have not been removed by section 8 and the trustees will in any properly drafted trust have default powers in the event of the illness, incapacity or death of the named beneficiary delegate. Such powers remain within the trustees’ functions, albeit ones which they

⁴⁷¹ *Op. cit.*, para. 6.4.

have delegated. The real problem with using the section 8 power of restricting and negating section 6 absolute owner powers, by providing that they were only to be exercised while a section 9 delegation is in force, is the prospect of a stalemate between the trustees and relevant beneficiary and a vacuum or lacuna, where there will be nobody to exercise the powers where a delegation is not in force, so that section 8 will operate.

The preferable course of action is to draft an express clause to override section 9 and structure the settlement accordingly. Whitehouse and Hassall state that, 'It seems to the authors that mandatory delegation sits uneasily with the concept of trusteeship (and with the revocation powers given by the section).'⁴⁷² *Emmet and Farrand on Title* states⁴⁷³ as a general observation on section 9(1) that directions made by the settlor in the trust instrument to trustees of land to make delegations, whether generally or as specified, should prove binding and enforceable, but there are no reasons given for this statement.

Another possibility is to confer an overriding equitable power on a protector⁴⁷⁴ who may be the tenant for life or a different individual. Positive overriding powers enabling the protector to direct the trustees to delegate to the tenant for life should be valid and enforceable by rules of equity, which prevail under section 6(6). If the trust instrument compels the trustees to delegate, equity should compel the trustees to recognise these overriding powers. The effect would be to create a situation like custodian trusteeship with the trustees similar to custodian trustees (though not fully since they will *inter alia* retain full powers over distribution) and the tenant for life in a position analogous to a management trustee.⁴⁷⁵

⁴⁷² *Op. cit.*, para. 2.85 footnote 1.

⁴⁷³ *Op. cit.*, R. 45 para. 22.027.

⁴⁷⁴ See Underhill and Hayton *op. cit.*, p. 29-34, Paul Matthews *Protectors: two cases, twenty questions* (1995) 9 T.L.I. 108, Andrew Penny *Rights and Powers of Trust Protectors: Rahman Revisited* [1995] 1 J.Int.P. 31.

⁴⁷⁵ See Underhill and Hayton *op. cit.*, p. 799-800, Hanbury and Martin *op. cit.*, p. 507-508. See also Public Trustee Act 1906 section 4(2).

Revocation of powers of delegation

Section 9(3) highlights the potentially transient nature of delegation, which contrasts with the position of a tenant for life under a strict settlement. Section 9(3) states that, ‘A power of attorney under subsection (1) shall be given by all the trustees jointly and (unless expressed to be irrevocable and to be given by way of security) may be revoked by any one or more of them; and such a power is revoked by the appointment as a trustee of a person other than those by whom it is given (though not by any of those persons dying or otherwise ceasing to be a trustee).’ Although revocation does not occur if one of the trustees dies or ceases to be a trustee, the appointment of a new trustee will automatically revoke the power of attorney. The fact that the power can be revoked at any time highlights the reality that the new provisions cannot be the functional equivalent of a strict settlement.

Section 9(4) was substantially amended at Report Stage⁴⁷⁶ into its present form. Section 9(4) states that, ‘Where a beneficiary to whom functions are delegated by a power of attorney under subsection (1) ceases to be a person beneficially entitled to an interest in possession in land subject to the trust- (a) if the functions are delegated to him alone, the power is revoked, (b) if the functions are delegated to him and to other beneficiaries to be exercised by them jointly (but not separately), the power is revoked if each of the other beneficiaries ceases to be so entitled....., and (c) if the functions are delegated to him and to other beneficiaries to be exercised by them separately (or either separately or jointly), the power is revoked in so far as it relates to him.’

One criticism of section 9(4) raised by Lord Mishcon at Third Reading⁴⁷⁷ is why automatic revocation is prevented under subsection (3) by provision that the power of attorney may be expressed to be irrevocable and to be given by way of security, but not under subsection (4). Lord Mishcon pointed out that the security interest which is to be protected might be assigned. The original holder should remain able to exercise the power for the benefit of his assignee. The use of the term ‘separately’ as opposed to ‘severally’ is interesting, since the speeches of the Lord Chancellor in the House of

⁴⁷⁶ H.L. Debs., Vol. 571, cols. 959-961. The provision became far more specific as to revocation of powers where powers were delegated jointly and separately.

⁴⁷⁷ H.L. Debs., Vol. 572, col. 95.

Lords consistently used the term ‘severally’,⁴⁷⁸ yet that term was not used in the subsection. It seems as if there is an attempt to use layman’s language in the subsection itself.

Delegation can be for a fixed or indefinite period under section 9(5), which provides that, ‘A delegation under subsection (1) may be for any period or indefinite’. This provision accords trustees the maximum flexibility unlike, for example, section 25 of the Trustee Act 1925 which is limited to 12 months or a shorter period. Since section 9(6) provides that, ‘A power of attorney under subsection (1) cannot be an enduring power within the meaning of the Enduring Powers of Attorney Act 1985’, the delegation will be revoked by a trustee’s mental incapacity.

Problems of protection for third parties where purported delegation by trustees

Section 9(2) provides that, ‘Where trustees purport to delegate to a person by a power of attorney under subsection (1) functions relating to any land and another person in good faith deals with him in relation to the land, he shall be presumed in favour of that other person to have been a person to whom the functions could be delegated unless that other person has knowledge at the time of the transaction that he was not such a person.’ Section 9(2) was not in the original Bill. It was introduced into the Bill at Report Stage.⁴⁷⁹ The Lord Chancellor stated that ‘Amendment No. 5 carries through an additional element of protection for third parties from section 29 of the Law of Property Act 1925,⁴⁸⁰ which Clause 9 supersedes.’⁴⁸¹

Sagacity of introducing concept of knowledge

The original amendment did not have the words ‘unless that other person has knowledge at the time of the transaction that he was not such a person’⁴⁸² and was

⁴⁷⁸ See H.L. Debs., Vol. 570, col. 1537 and Vol. 571, col. 959.

⁴⁷⁹ H.L. Debs., Vol. 571, cols. 958-960.

⁴⁸⁰ Section 29 of the Law of Property Act 1925 stated that, ‘... in favour of a lessee such writing shall, unless the contrary appears, be sufficient evidence that the person named therein is a person to whom the powers may be delegated, and the production of such writing shall, unless the contrary appears, be sufficient evidence that the delegation has not been revoked.’

⁴⁸¹ H.L. Debs., Vol. 571, col. 958.

⁴⁸² The original amendment stated that, ‘he shall (in the absence of evidence to the contrary) be presumed in favour of that other person to have been a person to whom the functions could be delegated.’

preferable, since it is undesirable to bring concepts of knowledge into this provision. This comprises actual knowledge⁴⁸³ as well as ‘Nelsonian’ and ‘naughty’ knowledge⁴⁸⁴ and knowledge raises issues as to the difference between knowledge and notice. Notice is wider than knowledge, since a person may be regarded as having notice of a fact not because he knows it, but because for legal purposes he is taken to know it.⁴⁸⁵

Millett J. in *Rignall Developments Ltd v. Halil*⁴⁸⁶ emphasised that notice and knowledge are not synonymous. The fundamental difference between the questions that arise in respect of notice, which are relevant in the doctrine of purchaser without notice, and knowledge that suffices for the imposition of a constructive trust, was starkly illustrated by Sir Robert Megarry V.-C. in *Re Montagu’s Settlement Trusts*, when he stated that, ‘The cold calculus of constructive and imputed notice does not seem to me to be an appropriate instrument for deciding whether a man’s conscience is sufficiently affected for it to be right to bind him by the obligations of a constructive trustee.’⁴⁸⁷ There remain grey areas of knowledge and presumably like

⁴⁸³ Compare the doctrine of notice where the tendency of the Court of Chancery was constantly to extend and refine the doctrines of constructive and imputed notice: see Megarry and Wade *op. cit.*, para. 5-024. Equity’s ambition was to eliminate the *bona fide* purchaser of the legal estate without notice, by ensuring that it should be almost impossible to escape notice of any equity properly created and recorded.

⁴⁸⁴ ‘Nelsonian’ knowledge covers knowledge obtainable but for shutting one’s eyes to what would otherwise be obvious. ‘Naughty’ knowledge is where one’s suspicions are aroused that the transaction was probably improper, but one deliberately or recklessly failed to make the inquiries an honest reasonable man would make in the circumstances. ‘Nelsonian’ and ‘naughty’ knowledge have developed to determine whether a person’s conscience is sufficiently affected for equity to impose the personal burdens of accountability as a constructive trustee: see Underhill and Hayton *op. cit.*, p. 973-978, Hayton and Marshall *op. cit.*, para. 11-111, *Baden v. Société Générale* [1992] 4 All E.R. 161 at 235 and *Re Montagu’s Settlement Trusts* [1987] Ch. 264. Sir Robert Megarry V.-C. in *Re Montagu’s Settlement Trusts* at 283-284 and 285 doubted that there is a general doctrine of imputed knowledge that corresponds to imputed notice. See now the Court of Appeal decision in *Bank of Credit and Commerce International Overseas Ltd v. Akindele* [2000] 3 W.L.R. 1423 where Nourse L.J. stated at 1439 that there should be a single test of knowledge for knowing receipt, ‘The recipient’s state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt.’ See also *Manifest Shipping Co. Ltd v. Uni-Polaris Shipping Co. Ltd* [2001] U.K.H.L. 1, [2001] 2 W.L.R. 170 where Lord Clyde stated para. 3 that, ‘Blind eye knowledge in my judgment requires a conscious reason for blinding the eye. There must be at least a suspicion of a trust about which you do not want to know and which you refuse to investigate.’ See also Lord Hobhouse paras. 24-26 and Lord Scott at para. 116.

⁴⁸⁵ *Ashburner’s Principles of Equity* (2nd edn 1933) by Denis Browne p. 59.

⁴⁸⁶ [1988] Ch. 190 at 202.

⁴⁸⁷ *Op. cit.*, at 273 and 278.

the doctrine of actual notice, there will not be knowledge where the facts have come to a person's ears only in the form of vague rumours.⁴⁸⁸

Beneficiaries in position of trustees?

The general principle

The first half of section 9(7) provides that, 'Beneficiaries to whom functions have been delegated under subsection (1) are, in relation to the exercise of the functions, in the same position as trustees (with the same duties and liabilities)'. This provision demonstrates that the position of the beneficiaries is similar to that of the tenant for life of settled land who is a trustee of the Settled Land Act powers,⁴⁸⁹ and it is also close to the wording of the old section 29(3) of the Law of Property Act 1925.⁴⁹⁰ The limitation 'in relation to the exercise of the functions' is important, because where issues of duty and liability do not relate to the exercise of the delegated functions, such beneficiaries would not for example be liable for the wrongful investment by the trustees of the proceeds of sale, even if the power of sale had been delegated to them.⁴⁹¹

In what circumstances are beneficiaries not to be regarded as trustees?

The second half of section 9(7) provides that, '..... but such beneficiaries shall not be regarded as trustees for any other purposes (including, in particular, the purposes of any enactment permitting the delegation of functions by trustees or imposing requirements relating to the payment of capital money)'. This could have been drafted better, since it is too broad to state that such beneficiaries shall not be regarded as trustees for any other purposes. It would have been preferable to have stated

⁴⁸⁸ *Barnhart v. Greenshields* (1853) 9 Moo. P.C. 18 at 36 where the Right Hon. T. Pemberton Leigh stated, 'The rule is settled, that a purchaser is not bound to attend to vague rumours- to statements by mere strangers, but that a notice, in order to be binding, must proceed from some person interested in the property'.

⁴⁸⁹ Section 107(1) of the Settled Land Act 1925 stated that, 'A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties.' It has been described as a highly interested trusteeship by Younger J. in *Re Earl of Stamford and Warrington* [1916] 1 Ch. 404 at 420. For more details, see Megarry and Wade (5th edn) *op. cit.*, p. 319 and (6th edn) *op. cit.*, paras. 8-013-8-014 and *Lewin on Trusts op. cit.*, paras. 37-27 and 37-120-37-129.

⁴⁹⁰ The relevant wording of section 29(3) was 'the person to whom the power is delegated shall, in relation to the exercise of the power by him, be deemed to be in the position of and to have the duties and liabilities of a trustee.'

⁴⁹¹ See Kenny and Kenny *op. cit.*, p. 12-13.

specifically that the two exclusions identified, subdelegation and receipt of capital money, are the sole purposes for which such beneficiaries were not to be regarded as trustees. The subsection does not specifically identify which enactment imposing requirements relating to the payment of capital money it is alluding to, though it is obviously referring to section 27(2) of the Law of Property Act 1925.

Barracrough and Matthews are critical of this part of section 9(7) for their view is that, 'It would have been clearer to have said directly that trustees cannot delegate their competence to give receipts for capital money, but this appears to be the somewhat indirect effect of section 9(7). The result is not beyond all shades of doubt, but it is certainly the safer conclusion to work on. And if it is wrong, grave problems would arise in relation to overreaching by a sole section 9 attorney.'⁴⁹² *Lewin on Trusts* is of the view that 'the relevant words of the 1996 Act are rather gnomic in this respect, they prevent trustees of land from delegating to their beneficiaries under this section the function of receiving capital money.'⁴⁹³

Lord Mishcon at Third Reading in the House of Lords⁴⁹⁴ was concerned that the provision was not sufficiently explicit and stated that, 'the Lord Chancellor stated at Committee stage that subsection (7), as it now is, prevents an attorney under that provision from giving a receipt, even on a basis that he is acting by direction of the trustees. But given the crucial importance of the point in a fraud context, would the noble and learned Lord care to consider whether some more explicit drafting is desirable in order to emphasise that the attorney is not authorized under that clause to receive capital money or sign receipts for it?'

The problem with the wording of section 9(7) is that it does not categorically rule out trustees giving a direction that such a beneficiary should receive capital money. A direction by no fewer than two trustees is specifically provided for in section 27(2) of the Law of Property Act 1925, and section 9(7) does not exclude this part of section 27(2) or prevent it from operating. The effect of section 9(7) is that beneficiaries to

⁴⁹² *Op. cit.*, para. 6.5.

⁴⁹³ *Op. cit.*, para. 37-27.

⁴⁹⁴ H.L. Debs., Vol. 572, col. 95.

whom powers have been delegated are not to be regarded as trustees for the purpose of receiving capital money nor for the purpose of giving a direction as to its payment.

Section 9(7) does not prevent the trustees from giving a direction that the capital money is to be paid to the beneficiary to whom powers have been delegated, for the beneficiary will not be acting as a trustee in this capacity. This is despite the statement of the Lord Chancellor at Committee Stage, who stated that, ‘the beneficiary is not to be taken as trustee, or acting by the direction of trustees, simply by reason of having had functions delegated to him.’⁴⁹⁵ Even the Lord Chancellor by implication is not ruling out trustees expressly directing the beneficiary to receive capital money; he appears only to be preventing the beneficiary by default receiving the money under the principle of acting by the direction of the trustees merely by virtue of having had functions delegated to him.

Thus there could be a situation where trustees have delegated powers to a beneficiary and in addition, give a direction that the beneficiary is to receive capital money, and this will circumvent the relevant wording of section 9(7). Lord Mishcon was right to urge for more explicit drafting. It is worth comparing section 7(1) of the Trustee Delegation Act 1999, which ensures that the rule requiring capital money to be paid to at least two trustees cannot be circumvented by using a power of attorney, since it states that, ‘A requirement that capital money be paid to, or dealt with as directed by, at least two trustees is not satisfied by money being paid to or dealt with as directed by, or a receipt for money being given by, a relevant attorney’ An equivalent provision in section 9(7) would be a substantial improvement. In any event it would be prudent to advise a purchaser that he cannot validly pay direct to the beneficiary merely because the trustees authorise him to do so.

⁴⁹⁵ H.L. Debs., Vol. 570, col. 1536.

Problematic wording of duty of care

Section 9A is a welcome reform remedying defects in the previous law.⁴⁹⁶ Section 9A(1) states that, ‘The duty of care under section 1 of the Trustee Act 2000 applies to trustees of land in deciding whether to delegate any of their functions under section 9.’ Section 1(1) of the Trustee Act 2000 states that, ‘Whenever the duty under this subsection applies to a trustee, he must exercise such care and skill as is reasonable in the circumstances, having regard in particular- (a) to any special knowledge or experience that he has or holds himself out as having, and (b) if he acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.’

The duty of care is not expressed by the 2000 Act to be a general duty in the form of an all-encompassing statutory tort, but is a duty applicable in the limited circumstances specified in the Act.⁴⁹⁷ Whitehouse and Hassall state that section 9A is unique, because normally the duty applies once the decision has been taken to appoint an agent and does not apply to the taking of the decision.⁴⁹⁸ This is in a sense misguided, because the same was applicable to the old section 9(8).⁴⁹⁹

Is the statutory duty of care the same as the common law duty of care?

The Law Commission considered that the ‘proposals for a new statutory duty of care probably represent no more than a codification of the existing common law duty.’⁵⁰⁰

Reed and Wilson analyse the differences between the statutory and common law duty

⁴⁹⁶ The previous section 9(8) restricted the trustees’ liability to where they did not exercise reasonable care in deciding to delegate, which seemed to absolve trustees of further responsibility for supervision, providing they took reasonable care in deciding to delegate the function to the beneficiary. Section 9(8) was repealed by the Trustee Act 2000 section 40(1), Schedule 2 para. 46 and Schedule 4. For a critique of section 9(8), see Ann Kenny *Trusteeship Without Responsibility* [1997] Conv. 372. A question was included in the questionnaire on section 9(8), which was in force when the interviews took place.

⁴⁹⁷ See Hudson *op. cit.*, para. 9.2.2 referring to section 2.

⁴⁹⁸ *Op. cit.*, para. 2.99.

⁴⁹⁹ Section 9(8) stated that, ‘Where any function has been delegated to a beneficiary or beneficiaries under subsection (1), the trustees are jointly and severally liable for any act or default of the beneficiary, or any of the beneficiaries, in the exercise of the function if, and only if, the trustees did not exercise reasonable care in deciding to delegate the function to the beneficiary or beneficiaries.’

⁵⁰⁰ Law Com. No. 260 para. 2.35. For a more detailed discussion of the standard of care, see paras. 3.22-3.25.

of care⁵⁰¹ and regard the Law Commission's view as incorrect, because in their opinion, there are fundamental differences between the common law and statutory duties of care. They compare⁵⁰² the basic standard of care in *Re Whiteley*⁵⁰³ with section 1(1) of the Trustee Act 2000 by analysing the different terminology. They recognise that the basic tests are different, but conclude that the two standards can be reconciled relatively simply, because there is the basic underlying standard of care of the reasonable trustee.

Reed and Wilson contrast the particular expertise to be expected from particular professions and businesses in *Bartlett v. Barclays Bank Trust Co Ltd*⁵⁰⁴ with section 1(1)(a) and (b) of the Trustee Act 2000. They are of the view⁵⁰⁵ that the Act goes further than *Bartlett* in that it not only takes account of the standard to be expected from a particular class of specialist trustees, but also any particular special knowledge or expertise which the particular trustee holds himself out as having. In their view a subjective test is applied by section 1(1)(a), whereas an objective test prevails at common law, where the trustee would be judged according to the standard of the reasonable trust company.

Reading the judgment of Brightman J., this synopsis of Reed and Wilson is an oversimplification. Both objective and subjective elements will be involved in applying the principles stated by Brightman J. Brightman J. explained⁵⁰⁶ that, 'Just as under the law of contract, a professional person possessed of a particular skill is liable for breach of contract if he neglects to use the skill and experience which he professes, so I think that a professional corporate trustee is liable for breach of trust if loss is caused to the trust fund because it neglects to exercise the special care and skill which it professes to have'. This resembles the wording in section 1(1)(a) of the

⁵⁰¹ *Op. cit.*, paras. 2.48-2.54.

⁵⁰² *Op. cit.*, para. 2.50.

⁵⁰³ (1886) 33 Ch. D. 347 at 355 per Lindley L.J.- '...to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide.'

⁵⁰⁴ *Op. cit.*, at 534 per Brightman J., who stated, 'I am of the opinion that a higher duty of care is plainly due from someone like a trust corporation which carries on a specialised business of trust management. A trust corporation holds itself out in its advertising literature as being above ordinary mortals.'

⁵⁰⁵ *Op. cit.*, para. 2.51.

⁵⁰⁶ *Op. cit.*, at 534.

Trustee Act 2000, since it is similar wording ‘to any special knowledge or experience that he has or holds himself out as having’.

Reed and Wilson also consider the impact of remuneration.⁵⁰⁷ At common law a higher standard of care is owed by a trustee in receipt of remuneration than by one who is not. As Harman J. stated in *Re Waterman’s Will Trusts*⁵⁰⁸ ‘.... a paid trustee is expected to exercise a higher standard of diligence and knowledge than an unpaid trustee’ This should be compared to section 1(1), which does not refer to remuneration being a relevant factor in itself. A court is likely, however, to take remuneration into account when considering ‘the circumstances’ in section 1(1). An alternative explanation is that there is no need to specify remuneration in section 1(1), due to the provision in section 29 of the Trustee Act 2000 for reasonable remuneration for professional trustees, who will owe a higher standard of care due to section 1(1)(b).

The problem with this argument is that section 29(2) does not apply where the other trustees do not agree in writing nor does it apply to a sole trustee. In addition, it leaves a lacuna for ‘non-professional’ trustees who are entitled to remuneration but do not fall within section 1(1)(b). In such cases any sensible judge will take remuneration into account under ‘the circumstances’ of section 1(1). It is implicit in, though is not made explicit by, the Law Commission⁵⁰⁹ that remuneration will be a factor the court will take into account overall and it is doubtful that Reed and Wilson are correct in their view that in such cases the trustee may owe a higher duty at common law than under the Act. Their opinion,⁵¹⁰ that the Act has generally created a somewhat confused position and that the Law Commission’s ambition of creating a uniform duty of care⁵¹¹ remains largely unfulfilled, must be treated with caution.

⁵⁰⁷ *Op. cit.*, para. 2.52.

⁵⁰⁸ *Op. cit.*, at 1055.

⁵⁰⁹ Law Com. No. 260 para. 3.24.

⁵¹⁰ *Op. cit.*, para. 2.53.

⁵¹¹ See paras. 3.8-3.10.

Has the statutory duty of care superseded the common law duty of care?

Reed and Wilson question⁵¹² whether the new statutory duty replaces the common law duty where it applies or whether a trustee owes concurrent duties under the statute and at common law. They state that the Law Commission's stated intention was that the statutory duty of care is not intended to 'detract in any way from the fundamental common law duties'.⁵¹³ But this is to quote the Law Commission out of context. What the Law Commission actually stated was that the 'proposals for reform are not intended to detract in any way from the fundamental common law duties mentioned at paragraph 3.2 above.' The duties mentioned at paragraph 3.2 specify some of the duties of trustees and specifically do not cover the duty of care.

In fact it is clear that the Law Commission intended the statutory duty of care to supersede the common law. The Law Commission reviewed the different duties of care including the common law duty in paragraph 3.10 and concluded that, 'it is necessary to replace them with a clearer and more appropriate duty of care The need to replace these provisions provides an opportunity to create a single duty of care, which has obvious advantages, both in terms of clarity and coherence.' The Lord Chancellor stated at Second Reading that, 'This aspect codifies the present position at common law where there is already a duty of care'⁵¹⁴

Reed and Wilson are, therefore, mistaken in their conclusion that it may remain possible for an aggrieved beneficiary to bring two claims against a trustee arising out of one single act of default or at least to bring the two claims in the alternative. Rather it can be argued that section 1(1) impliedly repeals the common law,⁵¹⁵ not because the statutory provision is contrary to the common law rule, but because of the commonsense construction rule⁵¹⁶ or the presumption that Parliament wishes to avoid an anomalous result.⁵¹⁷ There needs to be counterbalanced against that a presumption against implied repeal, whereby the courts presume that Parliament does not intend an

⁵¹² *Op. cit.*, para. 2.54.

⁵¹³ Law Com. No. 260 para. 3.11.

⁵¹⁴ H.L. Debs., Vol. 612, col. 374.

⁵¹⁵ See Bennion *op. cit.*, section 87.

⁵¹⁶ *Ibid.*, section 197.

⁵¹⁷ *Ibid.*, section 315.

implied repeal or an implied revocation of a common law rule.⁵¹⁸ It is likely in these circumstances, however, that there is implied repeal to avoid an anomalous result.

All these problems reinforce Reed and Wilson's conclusion⁵¹⁹ that the new statutory duty of care has not introduced the clarity and consistency it was widely hoped it would and has given rise to far more questions than it has resolved.⁵²⁰ On an objective level Reed and Wilson's objections are somewhat exaggerated, being more academic than practical, though the statutory duty of care is likely to give rise to litigation on a number of levels for by its very nature, it is a litigious provision.

Duties whilst delegation continues

The major innovation is section 9A(3) which states that, 'While the delegation continues, the trustees- (a) must keep the delegation under review, (b) if circumstances make it appropriate to do so, must consider whether there is a need to exercise any power of intervention that they have, and (c) if they consider that there is a need to exercise such a power, must do so.' Section 9A(2) highlights one of the many dangers of an irrevocable appointment, since it provides that subsection (3) only applies where the delegation is not irrevocable. Section 9A(3) is similar to the wording in section 22(1) of the Trustee Act 2000.

The Explanatory Notes to the Trustee Act 2000 state (in relation to section 22) that it imposes a single duty with three elements to it, which may be an oversimplification. The Explanatory Notes also state that, 'The duty to "keep under review" does not oblige trustees to review the arrangements at specific intervals or in a particular way. The manner in which the duty should be discharged will depend upon what is reasonable in the circumstances.' The Act, therefore, does not provide how often the trustees must carry out the reviews and this will be a question of fact in each case.

⁵¹⁸ *Ibid.*, section 87.

⁵¹⁹ *Op. cit.*, paras. 2.67 and 2.69.

⁵²⁰ A further issue examined by Reed and Wilson *op. cit.*, paras. 2.60-2.69 is whether a breach of the statutory duty of care is actionable in tort as a breach of statutory duty or a breach which is actionable in equity. It seems far more likely that a breach of the statutory duty of care is actionable in equity. See also Nicholas Warren *Trustee risk and liability* (1999) 13 T.L.I. 226 at 230-231 who argues why trustees should not be subject to tortious liability as well as liability in equity.

The wording of section 9A(3)(b) may give rise to problems, because it is drafted widely with the inclusion of the phrase ‘if circumstances make it appropriate to do so’. It will raise issues of what is ‘appropriate’, which may be disputed on any given set of facts. An objective test will be imposed, but the subsection would have been drafted better if that phrase had been omitted. Section 9A(3)(c) may also give rise to problems, since it appears to impose a subjective test of ‘if they consider that there is a need to exercise such a power’ rather than an objective test ‘if there is a need to exercise such a power’ which would have been preferable, though objective elements are brought into this test under subsection (5) by the duty of care under section 1 of the Trustee Act 2000.

The definition of power of intervention in subsection (4) is narrow, since it is defined only as including ‘(a) a power to give directions to the beneficiary; (b) a power to revoke the delegation.’ Trustees may wish to intervene directly by dealing with third parties or dealing with various aspects of running the trust without necessarily revoking the delegation. This raises the issue where powers have been delegated to beneficiaries, whether the power of intervention enables trustees to exercise those powers which have been delegated. The straightforward answer is no, yet a power of intervention is meaningless unless it enables trustees to exercise powers which have been delegated, though this can only be after they have revoked the delegation. In this sense the definition of ‘power of intervention’ in subsection (4) is deficient, since it does not deal with difficult issues directly.

Is failure to act a breach of the duty of care?

The problem with the loose wording of subsection (5) which provides that, ‘The duty of care under section 1 of the Trustee Act 2000 applies to trustees in carrying out any duty under subsection (3)’, is that it is stated to apply only ‘to trustees in carrying out any duty’. Reed and Wilson are of the view that this suggests that a complete failure to fulfil such obligations does not result in a breach of the duty of care, so that there would seem to be no remedy for a failure to carry out the section 9A(3) duties, other

than a claim under the common law duty of care, provided the effect of section 9A(6) is not to exclude all liability for a failure to review by trustees.⁵²¹

Reed and Wilson do not discuss section 9A but consider sections 22 and 23 of the Trustee Act 2000 which contain similar provisions. The reflections which they make in connection with sections 22(1) and 23(1) are applicable to section 9A(5) and (6) of the 1996 Act and are applied accordingly in the ensuing discussion. They state⁵²² that the omission of any statutory remedy for a beneficiary in circumstances where trustees fail to use their powers in relation to land is a serious one. If the common law duty does still apply, the aggrieved beneficiary will be required to bring an action on the basis that the trustee has failed to administer the trust with reasonable care and skill.⁵²³

The problem with Reed and Wilson's interpretation of section 9A(5) is that it is unduly restrictive. Failure to carry out the duty under subsection (3) is included in the terminology of carrying out a duty, because it is incorporated in the overall classification of it. On a proper construction of section 9A(5) and (3), carrying out a duty under subsection (3) specifically obligates trustees in appropriate circumstances to act by obliging them to exercise a power of intervention, thus construing section 9A(5), the duty of care applies also to a failure to act. A court would take a broad view of subsection (5) and look at the purposive interpretation⁵²⁴ rather than a literal interpretation. An alternative interpretation, which may be the correct one, is that section 9A(5) is inapplicable where a trustee fails to act, because in such a case a trustee will be directly liable for breach of section 9A(3), which constitutes an independent obligation, and thus the duty of care is irrelevant to a failure to act.

Section 9A(6) limits the liability of trustees and in the view of Reed and Wilson creates an anomaly. Section 9A(6) states that, 'A trustee of land is not liable for any act or default of the beneficiary, or beneficiaries, unless the trustee fails to comply with the duty of care in deciding to delegate any of the trustees' functions under

⁵²¹ See Reed and Wilson *op. cit.*, para. 2.22 and discussion of section 9A(6) *infra*.

⁵²² *Op. cit.*, para. 2.18.

⁵²³ *Op. cit.*, para. 2.23.

⁵²⁴ See Cross *op. cit.*, p. 17-20, 57-58.

section 9 or in carrying out any duty under subsection (3).’ By providing that the trustee is not liable for any act or default if the duty of care is complied with in the particular cases in which it applies, Reed and Wilson argue that it would seem to exclude liability for any default arising from a failure to do something not covered by the statutory duty.⁵²⁵

If section 9A(6) is construed to confer wide exemption from liability, the Act has created an extremely serious lacuna, which leaves the beneficiaries in a somewhat vulnerable position and less well protected than under the Trustee Act 1925.⁵²⁶ Reed and Wilson express the view that it is extremely unlikely that this was Parliament’s intention. They argue⁵²⁷ that an alternative construction is that a failure to comply with the duty is a default of the trustee, distinct from that of the beneficiary-delegate, and thus outside the scope of section 9A(6). In their view as the statutory duty of care does not extend to such a default, the trustee is subject to the common law duty of care.

Yet Parliament cannot have intended that the common law duty of care should apply where there is a complete failure by trustees in carrying out their duties under section 9A(3). The better view is that failure to act will be a breach of the trustees’ duty under section 9A(3) and that section 9A(6) is irrelevant. Whitehouse and Hassall question if the trustee does breach the statutory duty of care, whether the trustee becomes vicariously liable for the acts of the attorney or whether the trustee’s liability is determined on the basis of his own breach of duty.⁵²⁸ Their view is that the wording of the subsection could be clearer, but that this is not a case of vicarious liability, because liability only occurs as a result of the personal defaults of the trustee.

The problem with this interpretation is that the wording of subsection (6) is wording of vicarious liability being ‘liable for any act or default of the beneficiary’. This reflects the language of section 25(7) of the Trustee Act 1925 ‘liable for the acts or defaults of the donor’ and the old section 9(8) of the 1996 Act ‘liable for any act or

⁵²⁵ *Op. cit.*, para. 2.57.

⁵²⁶ *Op. cit.*, para. 2.58.

⁵²⁷ *Op. cit.*, paras. 2.57-2.59 and 5.44.

⁵²⁸ *Op. cit.*, para. 2.99 and para. 12.90 on section 23(1) of the Trustee Act 2000.

default of the beneficiary', both of which by Whitehouse and Hassall's own admission constitute vicarious liability. Liability under section 9(8) also arose as a result of personal defaults of the trustee in not exercising reasonable care in deciding to delegate the function to the beneficiary, but this was still a case of vicarious liability. On the wording of section 9A(6) only vicarious liability arises, whereas a breach of section 9A(3) constitutes personal liability. There may be an overlap of cases between the two, thus giving rise to both personal and vicarious liability in an appropriate case.

Potential liability for the acts and defaults of the beneficiary-delegate is a disincentive to delegate and should be contrasted first, with the position under the Settled Land Act 1925, where trustees cannot be liable for the actions of the tenant for life, unless loss is caused by a trustee's own wilful default under section 96 of the Settled Land Act 1925, and secondly, with the trust for sale, where trustees for sale were specifically stated by section 29(3) of the Law of Property Act 1925 not to be liable for the actions of beneficiaries to whom management and leasing powers were delegated under section 29 of the Law of Property Act 1925.

Conclusion

Section 9 contains deficient and flawed provisions and at the same time represents a requisite, inevitable compromise. It has not been drafted to be the functional equivalent of a strict settlement. Section 9(1) should be made subject to a contrary intention and drafted to adopt wording similar to section 69(2) of the Trustee Act 1925, so that section 9(1) applies if and so far only as a contrary intention is not expressed in the instrument creating the trust and have effect subject to the terms of that instrument. An express clause should provide for mandatory delegation where this is required rather than section 9 itself, since section 9 covers both co-ownership and successive interests, thus rendering it neither feasible nor practical to be drafted to compel trustee delegation. Section 9(2) should be amended to delete reference to knowledge and be subject to evidence to the contrary.

The second half of section 9(7) should be drafted to specify that for the purposes of subdelegation and receipt of capital money, such beneficiaries shall not be regarded as

trustees. A clause prohibiting trustees giving a direction that a beneficiary is to receive capital money is also necessary. Section 9A(3)(b) should be amended to delete the words 'if circumstances make it appropriate to do so' and (c) should be amended to insert the words 'if there is a need to exercise such a power' in place of the words 'if they consider that there is a need to exercise such a power'. Lastly, section 9A(5) would have been better drafted if it had stated that, 'The duty of care under section 1 of the 2000 Act applies to trustees for the purposes of subsection (3).'

CHAPTER 8- RIGHT TO OCCUPY: A JUDICIOUS INNOVATION?

DO SOLICITORS THINK THAT IT WAS WORTHWHILE TO INTRODUCE A STATUTORY RIGHT TO OCCUPY UNDER SECTION 12?

10 solicitors⁵²⁹ stated that they thought that it was worthwhile to introduce a statutory right to occupy under section 12.

7 solicitors⁵³⁰ stated that they thought that it was not worthwhile to introduce a statutory right to occupy under section 12.

The reform may have been advantageous in cases of co-ownership rather than successive interest trusts as identified by Chris Jarman (Payne Hicks Beach) who stated, *‘Yes for co-ownership; definitely no for successive interest trusts. That is another example of the whole thrust of the Law Commission Report being pointed at co-ownership and suddenly infecting other trusts as well.’* Bringing two different regimes under one umbrella and imposing one set of rules inevitably mean that the new law may be unsuited to one or the other.

The tax advantages were stressed by Nigel Reid (Linklaters and Alliance) who stated that, *‘It is very important for tax reasons: capital gains tax. To get principal private residence relief for a beneficiary occupying under a trust, you have to be entitled to occupy under the terms of the trust. By making it statutory, you do not get any problems if you miss it out of the draft.’*

Questionable scope of the right to occupy

Section 12(1) states that, ‘A beneficiary who is beneficially entitled to an interest in possession in land subject to a trust of land is entitled by reason of his interest to occupy the land at any time if at that time- (a) the purposes of the trust include making the land available for his occupation (or for the occupation of beneficiaries of

⁵²⁹ Allen and Overy, Charles Russell, Currey and Co, Eversheds, Linklaters and Alliance, Macfarlanes, May, May and Merrimans, Official Solicitor, Payne Hicks Beach and Wiggin and Co.

⁵³⁰ Boodle Hatfield, Burges Salmon, Farrer and Co, Herbert Smith, Speechly Bircham, Public Trust Office and Withers.

a class of which he is a member or of beneficiaries in general), or (b) the land is held by the trustees so as to be available.’ With the abolition of conversion, section 12 recognises that beneficiaries under trusts of land have rights in the land. This right of occupation is completely new as compared with the previous statutory provisions concerning trusts for sale under which there were no statutory rights of occupation for beneficiaries.⁵³¹

Prior to the 1996 Act there had been great debate over whether a person with a beneficial interest under a trust for sale had a right to occupy the land.⁵³² Beneficial joint tenants and tenants in common had rights of occupation,⁵³³ but it was not clear whether the same was true of someone with a life interest under a trust for sale of land. The tenant for life under a strict settlement was generally entitled to occupy the land by virtue of having the legal estate vested in him as well as beneficial enjoyment of his estate for life in equity.⁵³⁴ It is unfortunate that the Law Commission did not analyse the existing law on rights to occupation under trusts for sale⁵³⁵ merely indicating a two-fold reason for the reform that, ‘It is not clear whether trustees for sale have a power to let beneficiaries into occupation, and it may also be that,

⁵³¹ See *Williams on Wills op. cit.*, para. 208.6.

⁵³² See J.G. Ross Martyn *Co-owners and Their Entitlement to Occupy their Land before and after the Trusts of Land and Appointment of Trustees Act 1996: Theoretical Doubts are Replaced by Practical Difficulties* [1997] Conv. 254 for a review of cases in this area. The modern view that a right of occupation was a constituent element of the rights enjoyed by a beneficiary in cases of co-ownership culminated in the House of Lords decision in *City of London Building Society v. Flegg* [1988] A.C. 54 and can be traced back to Lord Denning’s judgment in *Bull v. Bull* [1955] 1 Q.B. 234. This should be compared with land held on an express trust for sale in *Barclay v. Barclay* [1970] 2 Q.B. 677 where there was held to be no right to occupy as the prime object of the trust was that the bungalow should be sold. The traditional view is that occupation by a beneficiary was not a right but a privilege to be accorded or withheld by the trustees in the fiduciary exercise of their powers of management of the land: see cases in Gray and Gray *op. cit.*, p. 897 footnote 7. See also D.G. Barnsley *Co-owners’ Rights to Occupy Trust Land* [1998] C.L.J. 123 and the discussion in Gray *Elements of Land Law* (2nd edn) *op. cit.*, p. 546-550.

⁵³³ *Bull v. Bull* and *City of London Building Society v. Flegg*.

⁵³⁴ See *Emmet and Farrand on Title op. cit.*, R. 46 and 47 para. 22.034 and *Lewin on Trusts op. cit.*, paras. 37-54, 37-72 and 37-96.

⁵³⁵ Law Com. No. 181 para. 13.2. As Barnsley criticised *op. cit.*, p. 126 footnote 17, this issue was dealt with by the Law Commission in a single sentence and a three line footnote, footnote 43 in para. 1.3 referring to their Working Paper No. 94 para. 3.22. It is also odd that the Law Commission Report made no mention of *Flegg* and it is Barnsley’s view *op. cit.*, p. 126 that if the Law Commission had taken *Flegg* into account, there would have been much less ground for their uncertainty justifying a closer look at the pre-1926 common law position. Barnsley does not mention that the Law Commission in Working Paper No. 94 para. 8.7 did discuss the position in a little more detail and did state that, ‘The rights of residence of co-owners depend on the pre-1926 law, and have been the matter of some dispute.’

although under the new system the trustees will have the powers of an absolute owner, this would not be considered a proper exercise of those powers.’⁵³⁶

Section 12(1), by applying to a beneficiary who is beneficially entitled to an interest in possession in land,⁵³⁷ does not apply to objects of a discretionary trust, annuitants, pension trust beneficiaries or any beneficiary holding his beneficial interest in a fiduciary capacity for others. The interest must be in possession as stated by the Inland Revenue⁵³⁸ in the sense explained in *Pearson v. IRC* of ‘a present right of present enjoyment’.⁵³⁹ The view of *Williams on Wills*⁵⁴⁰ is that the use of the term ‘interest in possession’ in the 1996 Act is probably influenced by the Inheritance Tax Act 1984, but it does not follow that what is an interest in possession for the purposes of the 1984 Act is also one within the 1996 Act, since the statutory purposes of the use of the term are different.⁵⁴¹

Problems identifying purposes of the trust

Section 12(1)(a) and (b) appear to be infelicitously drafted.⁵⁴² It is unclear how the ‘purposes’ of the trust in section 12(1)(a) are to be ascertained. Gray and Gray are of the view that, ‘The essence of a trust “purpose” is left perilously undefined.’⁵⁴³ Land jointly purchased for residential occupation will usually satisfy the test.⁵⁴⁴ There may

⁵³⁶ Megarry and Wade *op. cit.*, para. 8-139 footnote 37 are of the view that this was presumably because of the decision in *Re Power* where Jenkins J. held that an express power for trustees to invest in the purchase of land was held not to authorise the trustees to purchase a residence for a beneficiary. It is likely that section 6(1) would include such a power. An obvious alternative would have been to confer the power on the trustees expressly instead of giving the beneficiary a right to occupy.

⁵³⁷ The Law Commission in Law Com. No. 181 explained in para. 13.3 that, ‘This right will only extend to beneficiaries with a present, vested, interest in the land’ and footnote 147 states that, ‘In other words, those with a purely monetary interest, or with a future or contingent interest, will be excluded.’ Clearly where the interest of a beneficiary is in income only, such a beneficiary does not have an interest in land notwithstanding the effect of section 3: see Kenny and Kenny *op. cit.*, p. 16.

⁵³⁸ See Chris Jarman *Q & A* (1997) 389 Tax Journal 19.

⁵³⁹ *Op. cit.*, at 775 per Viscount Dilhorne.

⁵⁴⁰ *Op. cit.*, para. 208.12.

⁵⁴¹ For seven main differences between interest in possession in the 1996 Act and the 1984 Act, see *Williams on Wills op. cit.*, para. 208.13.

⁵⁴² See Kenny and Kenny *op. cit.*, p. 16.

⁵⁴³ *Op. cit.*, p. 899. They state that it is inferable that the draftsman was attempting to incorporate a distinction which gained some currency under the old trust for sale between those trusts whose ‘prime object’ lay in the long-term provision of residential utility for one or more beneficiaries and trusts whose ‘prime object’ was expressly concerned with an immediate disposition of the trust land and division of the sale proceeds.

⁵⁴⁴ But not always, as in *Barclay v. Barclay*: see Whitehouse and Hassall *op. cit.*, para. 2.126 footnote 2.

be an express term of the trust or evidence in a letter of wishes, although they are unusual in this type of trust and if the settlor is still alive, he may indicate what his purposes were in establishing the trust. Lightman J. adopted a sensible approach in *I.R.C. v. Eversden*⁵⁴⁵ when he stated that, ‘it may be noted that the “purposes” of a trust are primarily to be found in the trust instrument, but may in appropriate cases be found outside it: such purposes may however be expected to be consistent with the contents of the trust instrument.’

The purposes of the trust may change in accordance with the needs of beneficiaries and changing circumstances.⁵⁴⁶ Whitehouse and Hassall argue correctly that, ‘The statutory test is what the purposes were “at that time”; i.e. not necessarily when the trust was created, but at any time when a beneficiary is entitled to an interest in possession so that the question of occupying trust land is in issue.’⁵⁴⁷ It should be noted that the words ‘at that time’ were not in the original clause 7(1) of the draft Bill attached to the Law Commission Report and their introduction reinforces the correctness of their assertion. Although settlors should now specify the purposes which they may not have done in the past, it will be for the trustees to decide what the current purposes are.⁵⁴⁸

It is to be regretted that section 12(1)(a) will encourage the court to embark on the kind of speculative journey it took in the ‘family home’ cases under section 30 of the Law of Property Act 1925 to inquire into the purpose of the trust.⁵⁴⁹ Smith laments the fact that given that most disputes are most likely to arise when facts change and especially relationships break down, the operation of section 12 may well be anything

⁵⁴⁵ [2002] E.W.H.C. 1360, [2002] S.T.C. 1109 para. 25. It should be noted that the Court of Appeal [2003] E.W.C.A. Civ. 668, [2003] S.T.C. 822 did not comment on the 1996 Act.

⁵⁴⁶ Thompson *Modern Land Law op. cit.*, p. 303 argues that one has regard to the purpose of the trust at the time when a beneficiary seeks to exercise his right to possession and not the time when the trust was created.

⁵⁴⁷ *Op. cit.*, para. 2.126. See also Barnsley *op. cit.*, p. 132-133.

⁵⁴⁸ As Barnsley states *op. cit.*, p. 133 footnote 41, a change of purpose would need the consent of all beneficial co-owners. It would not be open to the trustees to seek to vary the purposes of the trust so as to deprive a beneficiary of the right to occupy.

⁵⁴⁹ See Kenny and Kenny *op. cit.*, p. 16. They warn that the willingness of the court to manufacture a ‘purpose’, which the parties to an arrangement may or may not ever have had, must be an object lesson to settlors.

but straightforward.⁵⁵⁰ Clements questions whether there is to be a consistency of approach regarding purpose as between the factors to be taken into account under section 14 applications and a section 12 purpose or whether it is only express purposes declared in the trust instrument which are relevant.⁵⁵¹

Despite Clements' view that the 1996 Act provides no clear guidance on this, a court would not limit itself under section 12 to express purposes and would take a broad view of purpose under section 12.⁵⁵² Clements welcomes analysis of purposes under section 12(1)(a), since it cleared up the issue addressed by Lord Browne-Wilkinson in the debates on the Bill as to how the Act applied to pension funds held on trust and investment trusts which include land.⁵⁵³ It is now more crucial than before for the draftsman of such arrangements to draw up a coherent and unambiguous trust instrument making the purpose of the arrangement clear.⁵⁵⁴

Difficulties interpreting land 'held by the trustees so as to be so available'

The alternative in section 12(1)(b) is where 'the land is held⁵⁵⁵ by the trustees so as to be so available'. This raises questions as to what is meant by 'available'.

'Availability' is a question of fact and each case is to be analysed on its own facts. The view of Barraclough and Matthews is that 'availability' is not a clear cut concept and they ask what the position is if the property is to be sold in a few weeks, a couple of months or a year.⁵⁵⁶ The obvious answer is that the property is available before the sale and not thereafter. They also question if the property is a hotel, whether a beneficiary can claim to use an unoccupied room for the night. The answer is likely to be in the negative as hotel rooms are to be paid for, are not to be given away

⁵⁵⁰ *Property Law op. cit.*, p. 309.

⁵⁵¹ L.M. Clements *The Changing Face of Trusts: the Trusts of Land and Appointment of Trustees Act 1996* (1998) 61 M.L.R. 56 at 60.

⁵⁵² This view is shared by Underhill and Hayton *op. cit.*, p. 477 who state that the purposes in creating the trust are ascertained from the trust instrument itself and the circumstances in which it was made.

⁵⁵³ H.L. Debs., Vol. 569, col. 1725.

⁵⁵⁴ See Michael Harwood *A Home for Life- the New Trusts of Land Act* [1997] Fam. Law 182.

⁵⁵⁵ The wording in clause 7(1)(b) of the Bill attached to the Law Commission Report used the word 'acquired' instead of 'held' and used the phrase 'for that purpose' instead of 'as to be so available'. 'Acquired' is narrower than 'held' and 'held' is more appropriate terminology. The *Notes on Clauses* issued by the Lord Chancellor's Department on the House of Lords Bill in para. 139 clarifies that the new terminology allows for a subsequent purpose to be taken into consideration and gives the example in footnote 46 of a house bought for resale just before a slump in the property market which might now be used as a dwelling for a beneficiary.

⁵⁵⁶ *Op. cit.*, para. 8.4.

gratuitously and are to be kept unoccupied for that purpose. Smith expresses the view that a right conferred by virtue of section 12(1)(b) seems meaningless insofar as it depends upon a continuing intention upon the part of the trustees.⁵⁵⁷

A divergence of opinion emanates from the commentators as to whether (a) or (b) takes precedence. Kenny and Kenny are of the view that (a) must take precedence over (b), since it is inconceivable that the legislature can intend the land to be regarded as 'so available' if the purposes of the trust are expressly that it is not to be so available.⁵⁵⁸ This view was shared by Lightman J. in *I.R.C. v. Eversden*⁵⁵⁹ when he stated, 'it may likewise be noted that trustees can only hold land "so as to be available" for occupation by a beneficiary if this accords with the purposes of the trust instrument or a due exercise by them of their powers thereunder.'⁵⁶⁰ It is important to stress that where land is not intended to be available for occupation, it would be prudent to say so succinctly in the trust deed.

MacKenzie, Walker and Walton, on the other hand, are of the view that (b) prevails since the words 'so as to be available' are sufficiently wide to enable trustees to disregard the original purpose for which the land was being held or was acquired.⁵⁶¹ In their opinion where land is available for occupation, a beneficiary with an interest in possession will acquire a right to occupy it irrespective of its original purpose. The views of Kenny and Kenny and Lightman J. are to be preferred, since it is axiomatic that land will not be available for occupation if one of the purposes is that it is not to be available. To state otherwise is to ignore the explicit wording of section 12(1)(a) and to ignore the effect of the word 'so' in (b) in 'to be so available'.

⁵⁵⁷ *Property Law op. cit.*, p. 309.

⁵⁵⁸ *Op. cit.*, p. 17.

⁵⁵⁹ *Op. cit.*, para. 25. In *Eversden* the issue considered by Lightman J., though not considered by the Court of Appeal, was whether the settlor acquired on 1 January 1997 a right of occupation in the whole property by virtue of section 12(1)(a) or (b). Lightman J. held *op. cit.*, paras. 26-28 that both conditions required by section 12 were satisfied to give the settlor an entitlement to occupy the land.

⁵⁶⁰ *Lewin on Trusts* First Supplement to the Seventeenth Edition *op. cit.*, para. 37-56 comments that the mere fact that the trustees have an express power to allow a beneficiary to occupy trust land does not entitle the beneficiary to occupy the land unless the power is exercised.

⁵⁶¹ Judith-Anne MacKenzie, Andrew Walker and Peter Walton *A Guide to the Trusts of Land and Appointment of Trustees Act 1996* (1998) p. 54.

Lewin on Trusts examines whether and if so, to what extent, the potentially wide scope of section 12(1)(b) is cut down by the words ‘held by the trustees so as to be available’ and in their view it is unclear.⁵⁶² Yet in the situation which arose in *Barclay v. Barclay*,⁵⁶³ the child wishing to occupy would have had no rights of occupation under the pre-1997 law and it is, in fact, extremely unlikely that the house would be regarded as ‘held by the trustees so as to be available’. The result in *Barclay v. Barclay* was a just one on its facts and there is no justification for sidestepping it, unless it was the intention of the testator that the residing child should remain in occupation.

Hudson maintains that there are two possibilities as to what is meant by the term ‘hold’: either the trustees must have made a formal decision that the property is to be held in a particular manner, or more generally it must be merely practicable that the land is made available.⁵⁶⁴ Hudson does not express a preference, although a court may adopt the second, broader interpretation, since section 12(1)(b) is widely drafted. *Williams on Wills*, however, adopts the narrower view that the trustees must make some decision or take some action to make it available first⁵⁶⁵ which in their opinion necessitates a discussion of (b) incontrovertibly overlapping with (a). Whether overlap was intended by section 12(1) is doubtful, since the word ‘or’ necessitates that (a) and (b) are alternatives and should remain as such.

Section 12(2) states that, ‘Subsection (1) does not confer on a beneficiary a right to occupy land if it is either unavailable or unsuitable for occupation by him.’ This raises the question whether the use of the word ‘unavailable’ in section 12(2) is otiose, since it does not add anything to section 12(1)(b) and cannot serve any useful purpose. The only rationale for its inclusion is that if the land is unavailable for occupation, this will override section 12(1)(a), so that a beneficiary will not be able to claim a right to

⁵⁶² *Op. cit.*, para. 37-56.

⁵⁶³ As Lord Denning himself stated *op. cit.*, p. 684, ‘The prime object of the trust was that the bungalow should be sold. None of the five beneficiaries was given any right or interest in the bungalow itself. None of them was entitled to possession of it. The testator, by his will, expressly directed that it was to be sold and the proceeds divided between them.’

⁵⁶⁴ *Op. cit.*, para. 16.2.3.

⁵⁶⁵ *Op. cit.*, para. 208.7 on the issue of vacant land.

occupy on the ground of the purposes of the trust. *Williams on Wills* considers⁵⁶⁶ the duplication of the availability test slightly puzzling, but reaches the same conclusion that the explanation may be that ‘unavailable’ in terms of section 12(2) is intended for section 12(1)(a) cases, that is where the purposes of the trust are to make the land available.

Barnsley states that land is not unavailable for occupation because there is another beneficiary already living there, due to the overriding unity of possession existing between beneficiaries.⁵⁶⁷ ‘Unavailable’ will cover where the property is let⁵⁶⁸ or where the trustees decide to sell the land. Kenny and Kenny question whether a house is unavailable where it is presently occupied by retired retainers whom the trustees have the right but not the will to evict.⁵⁶⁹ The answer must be that it is unavailable until the trustees evict the retired retainers.

Meaning of ‘unsuitable’

The word ‘unsuitable’ is difficult to apply, since it has both objective and subjective connotations. Jonathan Parker L.J. stated in *Chan Pui Chun v. Leung Kam Ho*⁵⁷⁰ that, ‘There is no statutory definition or guidance as to what is meant by “unsuitable” in this context, and it would be rash indeed to attempt an exhaustive definition or explanation of its meaning. In the context of the present case it is, I think, enough to say that “unsuitability” for this purpose must involve a consideration not only of the general nature and physical characteristics of the particular property but also a consideration of the personal characteristics, circumstances and requirements of the particular beneficiary. This much is, I think, clear from the fact that the statutory

⁵⁶⁶ *Op. cit.*, para. 208.8.

⁵⁶⁷ *Op. cit.*, p. 134.

⁵⁶⁸ Martyn *op. cit.*, p. 260 questions whether land is unavailable if it is already occupied by tenants or licensees or if it is only unavailable (Martyn writes available but this must be an error) if their rights of occupation cannot be terminated. The answer must be that it is unavailable if it is already occupied and the fact that rights of occupation can be terminated does not make the property available if there is *de facto* occupation of the property.

⁵⁶⁹ *Op. cit.*, p. 17.

⁵⁷⁰ [2002] E.W.C.A. Civ. 1075, [2003] 1 F.L.R. 23 at para. 101. Jonathan Parker L.J. rejected at para. 102 the suggestion that unsuitability arose on the facts of the case on the basis of the house being too large for Miss Chan’s needs and too expensive for her to maintain. He maintained that, ‘I would have taken some persuading that a property which was on any footing suitable for occupation by Miss Chan and Mr. Leung whilst they lived together should be regarded as unsuitable for occupation by her alone once Mr. Leung had left.’ This must be treated with caution, since every case will be determined on its own facts.

expression is not simply “unsuitable for occupation” but “unsuitable for occupation *by him*”, that is to say by the particular beneficiary.’

Thus the unsuitability may arise either from the nature of the land⁵⁷¹ (which Barnsley terms objective unsuitability⁵⁷²) or from the characteristics of the relevant beneficiary⁵⁷³ (which Barnsley terms subjective unsuitability⁵⁷⁴). Barnsley questions whether it is open to argument on behalf of existing beneficiary occupants that there exists a lack of compatibility⁵⁷⁵ between them and a beneficiary entitled through inheritance on the ground of his addiction to drugs or criminal record and whether the beneficiary’s mental or physical disability is relevant in determining suitability. These are all factors which must be taken into account and each case will be decided on its particular facts.

The *Notes on Clauses* issued by the Lord Chancellor’s Department⁵⁷⁶ state that, ‘The term “unsuitable” was added in order to ensure that a right to occupy does not arise where premises are empty (and therefore not “unavailable” for occupation) but it would be inappropriate to enable the particular beneficiary to occupy them: an example might be where the land is a working farm but the beneficiary is not, and has no intention of becoming, a farmer.’ The term ‘unsuitable’ was not in the original clause 7(1) of the Law Commission Bill attached to their Report which instead stated that ‘the land is reasonably available for occupation by him’.

It is debatable whether section 12(2) can remove an entitlement to occupy by intervening unsuitability. Intervening unavailability will remove the right due to the wording of section 12(1), but unsuitability is not covered by such wording. One way of interpreting section 12(2), construing the word ‘confer’ as the initial grant, is that unsuitability will *ab initio* prevent a right arising but once a beneficiary is in

⁵⁷¹ Whitehouse and Hassall *op. cit.*, para. 2.125 footnote 2 give an example of land being unsuitable if a beneficiary with no farming experience seeks to occupy a farm.

⁵⁷² *Op. cit.*, p. 134.

⁵⁷³ Whitehouse and Hassall *op. cit.*, para. 2.125. *Lewin on Trusts op. cit.*, para. 37-57 also holds this view.

⁵⁷⁴ *Op. cit.*, p. 134.

⁵⁷⁵ See Thompson *Modern Land Law op. cit.*, p. 304 who expresses the view that unsuitable is likely to embrace the suitability with regard to other occupiers.

⁵⁷⁶ *Op. cit.*, para. 140.

occupation, such a beneficiary does not cease to be entitled under section 12(1) and cannot be excluded due to being a beneficiary in occupation under section 13(7). The other interpretation is that unsuitability at any time will cause the right to occupy to terminate. If trustees can insist that a beneficiary move to more suitable accommodation to be offered by the trust, this is in fact recognising that a beneficiary will lose the right to occupy under section 12(2) due to supervening unsuitability. The better answer is that in such a case, the trustees must apply to the court under section 13(7) to prevent the beneficiary in occupation from continuing in occupation if the beneficiary does not consent.

Nature of the entitlement under section 12

Martyn identifies three kinds of entitlement under the pre-1997 law:⁵⁷⁷ the undoubted entitlement that could arise as a result of the exercise of the discretion of the trustees, an entitlement merely by virtue of being a co-owner⁵⁷⁸ and an entitlement based on the purpose for which the trust was created.⁵⁷⁹ Martyn points out⁵⁸⁰ that Lord Oliver in *City of London Building Society v. Flegg*⁵⁸¹ sets out both the second and third types of entitlement and did not choose between them. Yet this is to misconstrue what Lord Oliver was saying, since he was not setting out different types of entitlement for one to be chosen. What Lord Oliver said was, ‘One of the incidents of that beneficial interest is, or may be according to the agreement between the beneficiaries or to the purpose for which the trust was originally created, the enjoyment of the property in specie either alone or concurrently with other beneficiaries.’⁵⁸²

⁵⁷⁷ *Op. cit.*, p. 259.

⁵⁷⁸ Martyn reviews the cases which enunciate this principle: *Williams and Glyn's Bank v. Boland* [1981] A.C. 487 per Lord Wilberforce at 507 and per Lord Scarman at 510, *City of London Building Society v. Flegg* per Lord Scarman *op. cit.*, at 71, *Bull v. Bull*, *Jones (AE) v. Jones (FW)* [1977] 1 W.L.R. 438 per Lord Denning M.R. at 442.

⁵⁷⁹ There is support for this approach from Devlin L.J. in *Jones v. Challenger* [1961] 1 Q.B. 176 at 184 who explained Lord Denning's remarks in *Bull v. Bull* on the basis that ‘the house was bought for the purpose of providing a home for the mother and son and that, as the mother was still residing there, that purpose had not been brought to an end.’ As Martyn himself explains *op. cit.*, p. 257, the Court of Appeal in *Jones v. Challenger* was primarily concerned with the jurisdiction to order a sale under section 30 of the Law of Property Act 1925 and not with rights of occupation. The words of Devlin L.J. are consistent with both the right of one co-owner to occupy, and the right of the other co-owner to a sale, depending on the purpose for which the property was bought.

⁵⁸⁰ *Op. cit.*, p. 258.

⁵⁸¹ *Op. cit.*, p. 81.

⁵⁸² *Op. cit.*, p. 81.

What Lord Oliver was examining was the origins of the entitlement: agreement between the beneficiaries or the purpose for which the trust was created and the fact that they were alternatives dependent on the facts of the particular case. In fact Lord Oliver explicitly continued by saying, which Martyn does not quote, 'But the enjoyment in specie, whilst it may serve to give notice to third parties of the occupier's interest under the trust, is not a separate and severable right which can be regarded as, as it were, free standing.there is nothing in the statute or in the cases to suggest that the enjoyment of the property in specie of itself confers some independent right which will survive the operation of the overreaching provisions of the Law of Property Act 1925.'⁵⁸³

Based on this flawed foundation Martyn then proceeds with his view that section 12 moves through the three different kinds of entitlement.⁵⁸⁴ The opening of subsection (1) and paragraph (a) seem to be selecting the third alternative, the purpose rule. But paragraph (b) clearly goes further so that subsection (1), taken as a whole, suggests that beneficiaries are entitled to occupy merely by virtue of their status as beneficiaries, subject only to the land being available for occupation. However, Martyn continues, subsection (2) changes the course of the section yet again. The words 'unavailable' or 'unsuitable' appear to create objective criteria, but must be predominantly subjective in operation. The result will be that trustees will be carrying out much the same process as trustees carried before the 1996 Act when exercising their discretion whether or not to accede to the request of a beneficiary to go into occupation. This argument may be correct, but then Martyn makes a leap which he does not justify by stating that the difference now is that section 12(1)(b) and section 12(2) treat unavailability and unsuitability as objective criteria, depriving a beneficiary of an entitlement that he would otherwise have, and not as considerations for the exercise of a discretion.

The problem with this argument is that section 12(1)(b) and section 12(2) are not exclusively objective tests, since they entail consideration of subjective criteria and do not remove the operation of the discretion of trustees. Rather than there being three

⁵⁸³ *Op. cit.*, p. 81.

⁵⁸⁴ *Op. cit.*, p. 259-260.

kinds of entitlement prior to 1997 as Martyn claims, there is in fact one type of qualified entitlement expressed in subtly different ways as case law has evolved. Martyn himself recognises this to a certain extent when he states, before launching into his discussion of sections 12 and 13, that ‘the distinction between a rule that co-owners have a right of occupation merely by virtue of being co-owners, and a rule that they have the right because they bought the co-owned property for the purpose and with the intention of occupying it, is irrelevant.’ He needs to go even further and state that such a distinction cannot be justified. What section 12 represents is an amalgam and jumble of principles derived from the old law intermingled with explicitly new concepts of availability and suitability to constitute a qualified right, which may be the subject of great uncertainty and thus litigation due to the impreciseness of drafting of the section.

Hudson argues convincingly that one way to perceive section 12 is as a permissive provision granting a qualified right of occupation, in relation to which it is necessary to protect the trustees from a claim for breach of the duty of fairness by means of section 13 if some beneficiaries are protected rather than others.⁵⁸⁵ He maintains that it seems that the 1996 Act displaces the concept of interests in possession as the decisive factor in the treatment of the home in favour of considering the advantages of permitting some persons to continue to occupy the home.

Can the common law right of occupation still be relied upon?

Barnsley’s reactionary view is that sections 12 and 13 actually curtail the occupational rights of co-owners compared with their entitlement prior to 1926, and indeed after 1925, had the post-1925 law been correctly understood. Barnsley argues that there are strong grounds for arguing that these pre-Act rights are still extant so that co-owners disadvantaged by the Act will be able to ignore its provisions and rely on the superior general law rights.⁵⁸⁶ Barnsley’s view is that the 1996 Act has radically altered the nature of co-owners’ occupational rights as they existed at common law⁵⁸⁷ and the

⁵⁸⁵ *Op. cit.*, para. 16.2.3.

⁵⁸⁶ *Op. cit.*, p. 124.

⁵⁸⁷ *Op. cit.*, p. 130. Compare the view of Jeremy de Souza *Joint Tenancies: When Should They be Recommended?* [2003] P.C.B. 57 at 62 who states that sections 12-13 have abolished the principle in *Bull v. Bull*, citing *Eversden* at first instance *op. cit.*, para. 24 where Lightman J. stated that, ‘when the

statutory right is much less extensive.⁵⁸⁸ He argues that by making the right of occupation dependent on the purpose of the trust, the Act has introduced a qualification that did not normally affect the general law right to occupy⁵⁸⁹ and that concepts of unavailability and unsuitability erode the occupational rights of co-owners under the general law.⁵⁹⁰

Barnsley challenges the assumption of the Law Commission that the statutory right of occupation, though circumscribed in various respects, is superior to the pre-Act rights available under the general law.⁵⁹¹ He maintains that it seems to have escaped the notice of the Law Commission that the imposition of a trust of land instead of a trust for sale, coupled with the abolition of the doctrine of conversion for the purposes of co-ownership, would put the law back to the pre-1926 position where occupational rights of co-owners were in no way limited or restricted in the manner introduced by the Act.

Barnsley questions whether whatever occupational rights concurrent owners enjoyed before the Act would be replaced by the statutory scheme or whether the rights under the general law have been preserved. Barnsley's view is that section 12 does not profess to abolish pre-Act rights of occupation, that these rights continue to exist and in so far as they are superior to those available under the Act, an equitable co-owner is entitled to rely on his general law rights. His opinion is that since the general law rights of co-owners relating to occupation have been preserved, the Act may well turn out to be a dead letter.⁵⁹²

1996 Act came into force, a tenant in common in equity who had made a contribution to the purchase price was no longer automatically entitled by reason of such contribution alone to occupation of the property purchased.' See *Lewin on Trusts First Supplement to the Seventeenth Edition op. cit.*, para. 37-54. See also Jeremy de Souza *Another APR Muddle* (2001) 19 T. & E.T.J. 9 at 10 and (2001) 76 P.L.J. 23 at 24.

⁵⁸⁸ *Op. cit.*, p. 132.

⁵⁸⁹ Barnsley's view is that the reference to the purpose of the trust introduced a limitation usually of no consequence at common law and was inconsistent with the unity of possession which existed between all co-owners: *op. cit.*, p. 132 and p. 125 footnote 12.

⁵⁹⁰ *Op. cit.*, p. 134.

⁵⁹¹ *Op. cit.*, p. 136.

⁵⁹² *Op. cit.*, p. 145.

Barnsley's views can be challenged on two grounds. The first ground is that it is not axiomatic that the common law right was necessarily more extensive than the statutory right. There was no absolute right at common law and case law developed *ad hoc* from case to case with undefined parameters. Occupation by a beneficiary was historically not a right but a privilege to be accorded or withheld by the trustees in the fiduciary exercise of their powers of management of the land.⁵⁹³ Barnsley argues that reliance on *Re Bagot's Settlement* was misplaced and had no relevance to the totally different situation operating in a co-ownership case. Yet such a distinction was not drawn by Chitty J. and has not been accepted by other commentators.⁵⁹⁴ Although this approach became increasingly unsustainable as the courts gradually acknowledged that a right to occupy land was necessarily an integral component of the rights enjoyed by the trust for sale beneficiary,⁵⁹⁵ the common law position contrasts with the statutory provision, which because of its defined parameters, may superficially seem more restricted than the common law. This is, however, because it has been explicitly articulated as opposed to the common law right which is implicitly uncertain and indeterminate in its ambit and evolves on a case by case basis. Thus one is not comparing like with like.

Yet even if the common law right is more extensive than the statutory right, the second ground upon which Barnsley's views can be challenged would render the first ground otiose on the basis that the common law rights have been superseded by the statutory rights. A contrary view was tentatively suggested by McGonigal J. in *Chan Pui Chun v. Leung Kam Ho*⁵⁹⁶ who stated that, '... the common law rights are still

⁵⁹³ See Gray and Gray *op. cit.*, p. 897 footnote 7. This was the position before 1926: see *Re Bagot's Settlement* [1894] 1 Ch. 177 at 180-181 and *Re Earl of Stamford and Warrington* [1925] Ch. 162 at 171. This seems to have been confirmed in the restructuring of property law in the enactments of 1925: see *Re Landi (Deceased)* [1939] Ch. 828 at 835.

⁵⁹⁴ F.R. Crane *Notes of Recent Cases* (1955) 19 Conv. 146 at 147 argued that the decision in *Bull v. Bull* must be limited to its particular facts. See also Hamish R. Gray *The Rehabilitation of the Undivided Share in Land* (1955) 18 M.L.R. 408 at 409, G.A. Forrest *Bull v. Bull: Another View* (1956) 19 M.L.R. 312 at 313 and R.E. Megarry *Tenancies by the Entireties Redivivus* (1966) 82 L.Q.R. 29 at 33.

⁵⁹⁵ See Gray and Gray *op. cit.*, p. 898 and *Bull v. Bull*, *Williams & Glyn's Bank Ltd v. Boland*, *Kemmis v. Kemmis* [1988] 1 W.L.R. 1307 at 1325 per Purchas L.J., 1335-1336 per Nourse L.J., *Meyer v. Riddick* (1990) 60 P. & C.R. 50 at 54 per Fox L.J., *Re Citro* [1991] Ch. 142 at 158 per Nourse L.J., *State Bank of India v. Sood* [1997] Ch. 276 at 281 per Peter Gibson L.J.

⁵⁹⁶ [2002] B.P.I.R. 723 at 758. McGonigal J. regarded an article in the Conveyancer as 'a slight basis for a contention that Parliament intended to replace common law rights of occupation with a new and exclusive statutory right of occupation.' The justification for his views are judicial authority prior to the

relevant.’ Smith takes the view⁵⁹⁷ that although one may concede that the Act nowhere excludes the previous law, it would be amazing if a court were to stultify the modern statutory code relating to occupation, especially the statutory powers given to trustees to regulate possession.

Megarry and Wade explain⁵⁹⁸ that the Act is not explicit as to whether this qualified statutory right to occupy the land is additional to any common law right to occupy the land or whether it has wholly replaced it. Megarry and Wade’s view is that if the scheme laid down in the Act is to be effective, and in particular, if trustees are to be able to exercise their powers to exclude or restrict the right of a beneficiary to occupy the land, then the common law rights must be superseded.⁵⁹⁹ But this will only be the case in relation to a beneficiary who is beneficially entitled to an interest in possession in land but who has no other rights. In such a case the common law must be impliedly repealed. However, Megarry and Wade assert that where that beneficiary also holds the legal estate as trustee, he has a right at common law to occupy the land by reason of his joint legal ownership of it which is intrinsic to the unity of possession to which all co-owners are entitled at common law.⁶⁰⁰ Their view is that there is nothing in the Act to remove that right.

However, even in such a case the statutory provisions must override the common law as this would otherwise lead to injustice and inconsistency. A trustee cannot be in a more favourable position, relying on the common law right and statutory right, just because he is a trustee. Implied repeal can be substantiated on the ground of the presumption that Parliament wishes to avoid an anomalous result.⁶⁰¹ The presumption against implied repeal is unlikely to apply invoking the principle that the statute has not been drafted with sufficient care which is to turn on its head the principle which

1996 Act and the fact that section 12 is subject to section 13. His comments, which were *obiter*, were not considered by the Court of Appeal.

⁵⁹⁷ *Property Law op. cit.*, p. 307.

⁵⁹⁸ *Op. cit.*, para. 8-149.

⁵⁹⁹ Charles Harpum, the editor of the 6th edition, was the Law Commissioner at the time that the 1996 Act went through Parliament.

⁶⁰⁰ Similarly trustees who hold land as nominees on a bare trust cannot, in practice, impose conditions on the beneficiary’s occupancy because they must act at his direction: see Megarry and Wade *op. cit.*, para. 8-149.

⁶⁰¹ See Bennion *op. cit.*, section 87 and section 315.

Lord Roskill enunciated in *Jennings v. United States Government*,⁶⁰² that earlier cases on implied repeal must be approached and applied with caution, since until comparatively late in the nineteenth century, ‘statutes were not drafted with the same skill as today’.⁶⁰³ Smith takes the view that, ‘Presumably, this right to occupation is meant to be exclusive. It would follow that the holder of the legal estate could not claim to occupy personally, unless entitled by section 12 as a beneficiary.’⁶⁰⁴ It is evident that modern precision drafting has not been used in these sections of the 1996 Act.⁶⁰⁵

Status of the unity of possession?

Barnsley questions⁶⁰⁶ what has become of the unity of possession, because this issue was not addressed by the Law Commission. His view is that it is manifestly unjust to confer upon an occupying equitable co-tenant, qua trustee and owner of the legal estate, the right by statute to exclude his equitable co-tenant, when they both enjoy unity of possession attaching to their concurrent equitable interests. Barnsley’s view can be impugned on the basis that it is misconceived to assert that the Act destroys the unity of possession. It is heretical, undermining the whole basis of co-ownership, and indeed revisionist, to suggest that if a beneficiary is excluded from occupation that there would be no unity of possession and thus co-ownership would cease.

Barnsley himself admits that, ‘It is, perhaps, too extreme a view to maintain that the Act has destroyed the unity of possession, since this unity entitles each co-tenant to share in the income from the land.’ Yet he continues, ‘But if the land is non-income producing, and the excluded co-tenant has no statutory right to be paid rent by way of compensation, the Act does in fact destroy the unity for all practical purposes.’ The use of the phrase ‘for all practical purposes’ is revealing, since it is conceding that this is not the position legally.

⁶⁰² *Op. cit.*, at 116.

⁶⁰³ See Bennion *op. cit.*, section 87 footnote 6.

⁶⁰⁴ *Property Law op. cit.*, p. 308. Smith does state that this is contrary to a suggestion of Lord Denning M.R. in *Bedson v. Bedson* [1965] 2 Q.B. 666 at 678 and refers also to *Wight v. C.I.R.* [1982] 2 E.G.L.R. 236.

⁶⁰⁵ Compare the view taken in Bennion *op. cit.*, section 87.

⁶⁰⁶ *Op. cit.*, p. 137-138. Megarry and Wade *op. cit.*, para. 9-063 are of the view that Barnsley’s suggestion that an equitable co-owner no longer enjoys unity of possession may be more apparent than real.

Yet if Barnsley is to follow his argument through to its logical conclusion, his contention should be, or at least he should make it clear, that the Act destroys the unity of possession *ab initio* in all cases of co-ownership, for if there is any possibility of a beneficiary being excluded from occupation and not receiving compensation, there cannot be unity of possession *ab initio*. Barnsley himself acknowledges in his conclusion⁶⁰⁷ that, ‘Parliament has not abolished unity of possession. Unity of possession, therefore, survives, and with it the incidents attaching to it at common law.’

Therein lies the answer to Barnsley’s quandary. Unity of possession is a common law concept. Each tenant *totum tenet et nihil tenet*.⁶⁰⁸ Each holds the whole in the sense that in conjunction with his co-tenants he is entitled to present possession and enjoyment of the whole; yet he holds nothing in the sense that he is not entitled to the exclusive possession of any individual part of the whole. This reinforces the theoretical entitlement to possession of the whole rather than a physical entitlement. It is not necessary for each co-owner to occupy the whole: the law concentrates on their rights.⁶⁰⁹ Possession, as applied to equitable interests, refers to enjoyment of the interest rather than physical possession of the land, just as an equitable interest can be described as vested in possession regardless of physical occupation.⁶¹⁰ The common law right prevails unless regulated by statutory intervention, but this does not destroy the underlying unity of possession. It is also notable that Barnsley does not tackle the issue of what happened to the unity of possession prior to 1997 in cases where a beneficiary was excluded from possession.

Can section 12 be excluded?

As some of the solicitors noted in their replies, section 12 appears to be drafted in such a way that it cannot be excluded. Chris Jarman (Payne Hicks Beach) stated that, ‘*You cannot exclude section 12. There are one or two things you can say about the purpose of the trust, but it does not provide in terms for excluding that section. If*

⁶⁰⁷ *Op. cit.*, p. 144.

⁶⁰⁸ See Cheshire and Burn *op. cit.*, p. 242.

⁶⁰⁹ See Smith *Property Law op. cit.*, p. 287.

⁶¹⁰ *Ibid.*, p. 307 footnote 27.

there was provision for that section to yield to contrary intention, it would have said so.' Section 12 did not explicitly adopt the recommendation of the Law Commission in its Working Paper that, 'The settlor should be able to exclude the right of residence if he so wishes.'⁶¹¹ This means that the only way to exclude section 12 is to express that the purposes of the trust do not include making the land available for the occupation of the beneficiary and that the land is unavailable for such purposes.⁶¹² Expressly excluding section 12(1) does not appear to be contemplated by the Act, but a recital that it is not the wish of the settlor that any beneficiary should enjoy such a right and stating that any beneficial occupation should always be a matter exclusively within the discretion of the trustees is possible.⁶¹³

Judicial authority in this area can be derived from Lightman J. in *I.R.C. v. Eversden*⁶¹⁴ where after he stated, 'trustees can only hold land "so as to be available" for occupation by a beneficiary if this accords with the purposes of the trust instrument or a due exercise by them of their powers thereunder', he added, 'The mere fact that the settlement contains the additional powers is not of itself sufficient to satisfy either of the two conditions.' Exactly what Lightman J. is stating is unclear, but he seems to be declaring implicitly that the statutory right of occupation can be overridden by a direction in the trust instrument that a beneficiary should not be allowed to occupy the land. This is a sensible interpretation of section 12(1) and there are valid policy reasons to justify it and to permit a settlor's freedom of choice in this manner.

Lack of clarity in exclusion or restriction of right to occupy?

Section 13 has been described as an innovation by Baughen,⁶¹⁵ which is to be compared with his view that section 12 makes only a formal change in the previous law. Section 13(1) provides that, 'Where two or more beneficiaries are (or apart from this subsection would be) entitled under section 12 to occupy land, the trustees of land may exclude or restrict the entitlement of any one or more (but not all) of them.'

⁶¹¹ Working Paper No. 94 para. 8.9.

⁶¹² See *The Encyclopaedia of Forms and Precedents* Vol. 40(2) *op. cit.*, para. 459 [3223]. See also Whitehouse and Hassall *op. cit.*, para. 2.128.

⁶¹³ *The Encyclopaedia of Forms and Precedents* Vol. 40(2) *op. cit.*, para. 459 [3223].

⁶¹⁴ *Op. cit.*, para. 25.

⁶¹⁵ Simon Baughen *Trusts of Land and Family Practice* [1996] Fam. Law 736 at 737.

Martyn, however, criticises section 13(1) since, in his view,⁶¹⁶ the intention behind the section seems to have been to give the trustees power to do what the court could do under the old law when refusing an order for sale as in *Dennis v. McDonald*.⁶¹⁷ He is correct that this is desirable but his view is that this is not necessarily achieved, because a literal reading of section 13(1) means that neither subsection (1) nor the later subsections depending upon it apply at all if a co-owner is not entitled under section 12.

His argument is flawed, because he states that a co-owner will not be so entitled if the land is either unavailable or unsuitable for occupation by him under section 12(2), that therefore the power to impose conditions given by subsection (6) does not apply and in particular the co-owner in occupation cannot be ordered to compensate the co-owner out of occupation. He states that if this is right, then *Dennis v. McDonald* no longer applies in all cases in which it would have applied before and some co-owners out of occupation are worse off.

Martyn is misguided in his arguments, because in the *Dennis v. McDonald* situation where a couple live together before splitting up, both parties will have a right to occupy under section 12 and the party moving out does not lose that right just by moving out after deciding that he or she is unable to live with his or her partner. Section 12(2) will not disentitle a beneficiary at that stage of moving out and does not mean that a beneficiary is deprived of such a right. Such a beneficiary can only lose that right to occupy where the trustees exercise their powers under section 13(1). Thus in the *Dennis v. McDonald* scenario the claimant would be entitled to occupation rent under section 13 and for this reason Martyn is mistaken.

Barnsley laments the fact⁶¹⁸ that section 13, like section 12, attracted no discussion in its passage through Parliament and regrets that the Law Commission did not devote more attention to the implications of its own draft clause, especially in its possible

⁶¹⁶ *Op. cit.*, p. 260-261.

⁶¹⁷ [1982] Fam. 63. The Court of Appeal held that rent was payable by the occupying co-owner to the other co-owner who had been effectively excluded by the other party's violence.

⁶¹⁸ *Op. cit.*, p. 135.

operation to co-ownership situations.⁶¹⁹ His view is that the section raises far more questions than it seeks to resolve. Barnsley does not discuss the Law Commission's Working Paper,⁶²⁰ which evaluated whether the power should be placed on a statutory footing or whether it is best to leave the court with the widest power under a redrafted section 30 of the Law of Property Act 1925. The Law Commission stated that the advantage of legislating is that it would bring greater certainty and so make settlements out of court more likely. The disadvantage is that to bring greater certainty, one would have to define, with some precision, the situations in which an occupation rent could be paid and to do so would restrict what is at present a broad jurisdiction.

Kenny and Kenny argue that there is a certain lack of reality about section 13(1), since in numerical terms the trusts that come within this subsection will be overwhelmingly co-ownership trusts of houses, but any dispute between beneficiaries such as these will in reality not be resolved by the application of section 13.⁶²¹ Their opinion is that what will be required is an application to the court under section 14 for the court to apply its very wide jurisdiction under that section. Clements highlights the conflict of interest for a co-ownership trustee in the large number of co-ownership cases where the beneficiaries will also be the only trustees or only a few of the beneficiaries will be trustees.⁶²² Almost inevitably this will require an application to the court under section 14 to resolve the impasse. The answer to this is the fact that disputes will be resolved under section 14 does not *per se* undermine the importance of section 13 as a provision in its own right or provide a justification for arguing that it should not have been enacted.

⁶¹⁹ It would be fair to say that is clear from the Explanatory Notes to the Trusts of Land Bill in clause 7 that the Law Commission did not foresee any difficulties in its proposals. See also Law Com. No. 181 paras. 13.3 and 13.4.

⁶²⁰ No. 94 para. 8.10.

⁶²¹ *Op. cit.*, p. 18. Helen Clarke *Co-ownership of land and occupation rights* [1997] Legal Action, July, 18 states that section 13 is unlikely to assist where there is a dispute between co-owners.

⁶²² *The Changing Face of Trusts: the Trusts of Land and Appointment of Trustees Act 1996 op. cit.*, p. 61.

Can occupation of all the beneficiaries be restricted?

The operation of section 13(1) was demonstrated in *Rodway v. Landy*.⁶²³ Peter Gibson L.J. delivering the leading judgment in the Court of Appeal in *Rodway v. Landy* held that, ‘I do not see why, in relation to a single building which lends itself to physical partition, the trustees could not exclude or restrict one beneficiary’s entitlement to occupy one part and at the same time exclude or restrict the other beneficiary’s entitlement to occupy the other part. section 13(1) seems to me to make good sense and to provide a useful power which trustees might well wish to exercise in appropriate circumstances so as to be even-handed between beneficiaries.’⁶²⁴

The problem arose because of the words in parenthesis in section 13(1) ‘(but not all)’. A literal construction of section 13(1) would mean that the trustees cannot restrict the entitlement of all the beneficiaries, which would mean that the Court of Appeal in *Rodway v. Landy* could not have reached the decision which they did. However, to adopt such a construction would, as was asserted by counsel for the defendant, produce an irrational limitation on section 13(1), since it would mean that the trustees can exclude one of two beneficiaries entirely from the occupation of trust property, but not limit each of them to occupation of only part of it. Peter Gibson L.J. agreed with the conclusion of Martin Mann Q.C. sitting as Deputy Judge that, ‘An exercise of the power to exclude or restrict the entitlement of all of the beneficiaries in respect of some part of the land subject to the trust would render section 12(1) nugatory to that extent. The words therefore prohibit so extensive an exercise of the power. Accordingly, an exercise of the power to exclude or restrict the entitlement to occupation of one of two beneficiaries in relation to part is not offensive to section 12(1) so long as the other beneficiary is entitled to enjoy his right of occupation of that part. There is no ambiguity. The construction merely reflects that every part of a piece of land is unique.’⁶²⁵

This approach was explained well by counsel for the defendant who urged that the words ‘but not all’ ‘mean that the trustees may not exclude or restrict the entitlement

⁶²³ [2001] E.W.C.A. Civ. 471, [2001] Ch. 703.

⁶²⁴ *Ibid.*, para. 33.

⁶²⁵ *Ibid.*, para. 31.

of the beneficiaries collectively; after the trustees have exercised their powers the beneficiaries collectively must have rights which are as extensive as those which the beneficiaries collectively had previously.’ This common sense construction does not confront head-on the problems of the drafting of section 13(1). It avoids a strict interpretation of that subsection and involves a rewriting and reinterpretation, which could have been avoided by more careful drafting. There is no support in the subsection for the view that the construction should reflect that every piece of the land is unique, yet this is the only construction possible to avoid absurdity. *Rodway v. Landy* is an example of a shrewd decision being reached despite the constraints of the statutory provision, interpreting the statute in the only manner feasible to achieve a just solution.

One notable feature of *Rodway v. Landy* is the difficulty of arranging a sale without contravening the prohibition on selling the goodwill of a medical practice.⁶²⁶ It will be interesting to see whether in future cases, where the sale option is easier to effect, the courts will be more willing to order a sale. In *Rodway v. Landy* itself the occupation proposal agreed by the court had been proposed by one party but was opposed by the other party. In other cases the court may be more willing to take the view that a complete parting of the ways is desirable and best effected following a sale. Section 13 is most likely to be used in relation to commercial property and every case will inevitably depend on its own facts.

Uncertainty of ascertaining when it is unreasonable to exclude or restrict entitlement to occupy

Section 13(2) states that, ‘Trustees may not under subsection (1)- (a) unreasonably exclude any beneficiary’s entitlement to occupy land, or (b) restrict any such entitlement to an unreasonable extent.’⁶²⁷ Kenny and Kenny are forthright in their views on section 13(2) stating that this is legislation at its most pointless with no real

⁶²⁶ Section 54(1) of and paragraph 2(1) of Schedule 10 to the National Health Service Act 1977 makes it illegal to buy or sell the goodwill of a medical practice.

⁶²⁷ The test of reasonableness was originally included in Clause 7(2) of the draft Bill as a reference to the trustees being able to ‘restrict in a reasonable manner’, but it was thought to merit separate exposition: see the *Notes on Clauses op. cit.*, para. 143.

clue given as to what is reasonable or unreasonable.⁶²⁸ Their criticism is exaggerated, since section 13(2) is merely setting parameters, albeit imprecise ones, which will be applied to the facts of each case. Their view is that this is, if ever there was one, an area where ‘one man’s meat is another man’s poison’. The trustee has discretion so long as this is exercised reasonably and Kenny and Kenny regret that all that the introduction of this concept does is to transfer the discretion to the court.

This argument can, however, be used wherever the concept of reasonableness is imported into legislation and is an unconstructive assertion, which masks the benefits in having this provision, which are to curb and guide the exercise of the powers of the trustees. Barraclough and Matthews assert that, ‘Probably there was no alternative to using such vague terminology if (apparently) substantive justice was to be done to each individual case. But these unfortunate words will be productive of much litigation. Every beneficiary who finds him or herself on the receiving end of an exclusion or restriction under section 13(1) from the trustees will look for a weapon to beat the trustees with.’⁶²⁹

Can section 13(3) apply where only one beneficiary is entitled to occupy?

Kenny and Kenny are concerned⁶³⁰ that parts of section 13⁶³¹ apply only where two or more beneficiaries are entitled under section 12 to occupy land and parts of the section⁶³² apply to all cases which fall under section 12. They admit that when section 13 is examined as a whole, it seems to make most coherent sense if it is assumed that the whole of the section applies only when two or more beneficiaries are entitled to occupy land. But their view is that this is clearly not so, because there is nothing in subsection (3) and the following subsections, other than subsection (6), to link them to this fundamental requirement in subsection (1).

⁶²⁸ *Op. cit.*, p. 18. Kenny and Kenny question whether in the context of the family home, it is unreasonable to ask somebody to share a house with a person he does not like or in the context of a trust of a landed estate, it is unreasonable to refuse occupation to an heir who is a devotee of free love and new age philosophy.

⁶²⁹ *Op. cit.*, para. 8.6.

⁶³⁰ *Op. cit.*, p. 18.

⁶³¹ Subsections (1), (2) and (6).

⁶³² Subsections (3), (4), (5), (7) and (8).

This must be correct, since section 13 has not limited these subsections in this way. For example, section 13(3) states that, ‘The trustees of land may from time to time impose reasonable conditions on any beneficiary in relation to his occupation of land by reason of his entitlement under section 12.’ This should be compared with clause 7(2) of the draft Bill annexed to the Law Commission Report, which states unambiguously that the trustees have power to restrict occupation and impose reasonable conditions on occupiers only where two or more persons would be entitled to occupy.⁶³³

Gray and Gray,⁶³⁴ Sydenham⁶³⁵ and Smith⁶³⁶ agree with the view that subsection (3) can apply where only one beneficiary has a right to occupy. This is supported by the *Notes on Clauses*⁶³⁷ which states, ‘That restriction has been removed, to protect the interests of beneficiaries who do not have a right to occupy (or whose interest has been excluded or restricted⁶³⁸), which may be prejudiced if the occupying beneficiary were able to exercise his rights entirely unconditionally. The subsection also provides for greater flexibility by providing that conditions may be imposed from time to time.’ This means that where the particular circumstances of subsection (6) do not apply, the wording of subsection (3) does not exclude a more general condition requiring payment of rent for land occupied. The ability to impose conditions is of limited effect where there is only one beneficiary with a right to occupy.⁶³⁹ Compliance with conditions is not a prerequisite to claiming a right to occupy and where there is only one beneficiary with a right to occupy, there is no provision enabling the trustees to exclude that beneficiary.

⁶³³ Clause 7(2) states that, ‘Where, apart from this subsection, two or more persons would be entitled to occupy land under subsection (1), then the trustees may- (a) restrict in any reasonable manner they think fit the right of any of those persons to occupy the land or any part of it; (b) impose such reasonable conditions on any of those persons in relation to his occupation as they think fit.’

⁶³⁴ *Op. cit.*, p. 896 footnote 19.

⁶³⁵ *Trusts of Land op. cit.*, p. 93.

⁶³⁶ *Property Law op. cit.*, p. 310.

⁶³⁷ *Op. cit.*, para. 144.

⁶³⁸ It is unclear why this has been added since this is covered by section 13(1).

⁶³⁹ See Hopkins *The Trusts of Land and Appointment of Trustees Act 1996 op. cit.*, p. 420.

Are conditions imposed on a beneficiary enforceable?

The trustees' power to impose reasonable conditions on an occupying beneficiary under section 13(3) is a discretionary power to be exercised from time to time taking into account the matters set out in section 13(4) and which is subject to section 13(7). Peter Gibson L.J. held in *Rodway v. Landy*⁶⁴⁰ that 'a condition requiring a beneficiary to contribute to the cost of adapting the building to make each part suitable for his occupation falls within the statutory wording.' He rejected counsel's argument that 'a condition "in relation to [the beneficiary's] occupation of land" is one which has reference only to the way in which the beneficiary conducts himself whilst in occupation.' Peter Gibson L.J.'s view was that, 'I do not see why the very wide prepositional phrase "in relation to" should be construed so narrowly.'

Kenny and Kenny are of the view that section 13(5) is otiose.⁶⁴¹ Section 13(5) states that, 'The conditions which may be imposed on a beneficiary under subsection (3) include, in particular, conditions requiring him- (a) to pay any outgoings or expenses in respect of the land, or (b) to assume any other obligation in relation to the land or to any activity which is or is proposed to be conducted there.' The reason for their view is that since these conditions are conditions imposed under subsection (3), the outgoings, expenses or obligations must be reasonable. It may never be necessary to test the meaning of any of the particular phrases used in subsection (5) due to subsection (3).

Barnsley discusses⁶⁴² an additional burden which may be imposed by section 13(5), since it may require an occupying beneficiary to contribute towards the cost of repairs, which was not imposed prior to this time due to the decision in *Leigh v. Dickeson*.⁶⁴³ Gray and Gray, without discussing the point, state similarly that, 'This discretion appears sufficiently wide to cover a requirement of immediate compensation, in appropriate cases, for improvements effected by one beneficiary on

⁶⁴⁰ *Op. cit.*, para. 41.

⁶⁴¹ *Op. cit.*, p. 19.

⁶⁴² *Op. cit.*, p. 139.

⁶⁴³ (1884) 15 Q.B.D. 60.

the co-owned land, thereby rendering otiose much of the old case law on the equity of deferred reimbursement.’⁶⁴⁴

These arguments are, however, difficult to uphold, because the occupying beneficiary under section 13(5) will be required to contribute towards expenses on a different basis to *Leigh v. Dickeson*. The principle in *Leigh v. Dickeson* arises where one co-owner voluntarily expends money on the repair or permanent improvement of the co-owned property. There was no suggestion in *Leigh v. Dickeson* that the work was done by a co-owner who was also a trustee acting in the proper discharge of his duties. As Lord Brett M.R. stated in *Leigh v. Dickeson*, ‘it has always been clear that a voluntary payment cannot be recovered back’.⁶⁴⁵ Section 13(5) will only require contribution to repairs which trustees have carried out on behalf of the trust and in that sense section 13(5) does not infringe on the principle enunciated by *Leigh v. Dickeson*.

The view of *Williams on Wills*⁶⁴⁶ is that it seems that the will or settlement cannot determine in advance what conditions it will be reasonable to impose. It is more realistic to express an intention that occupation should be subject to repair and payment of outgoings than to direct that it shall be.⁶⁴⁷ It would be possible to provide that the occupying beneficiary’s interest in possession comes to an end in the event of failure to repair or pay outgoings, but this could be excessively draconian in its practical operation, at any rate unless there was a relief from forfeiture provision. If provision of the latter kind were included, there could be inheritance tax problems, with an interest in possession terminating as a result of the failure and then starting again when the forfeiture was relieved.

The conditions imposed under section 13(3) are not conditions for the right of occupation continuing to be exercisable, so that the right of occupation does not come

⁶⁴⁴ *Op. cit.*, p. 896 footnote 19.

⁶⁴⁵ *Op. cit.*, at p. 64.

⁶⁴⁶ *Op. cit.*, para. 208.18 point (2).

⁶⁴⁷ An expression of the testator’s intentions as to the burdens to be assumed by an occupying beneficiary will carry weight under section 13(4) and in the event of a dispute about the discharge of such burdens going to court, under section 15(1): see *Williams on Wills op. cit.*, para. 208.26.

to an end if those conditions are broken.⁶⁴⁸ However, the practical position is likely to be that if an occupying beneficiary is in serious breach of reasonably imposed conditions relating to his occupation, one option will be for the trustees to apply to the court under section 14 for an order for sale with vacant possession and the trustees can also ask the court for directions as to what they should do if sale is not ordered. An alternative course of action would be proceedings against the beneficiary for compensation for failure to carry out the obligations imposed.

By taking up occupation or continuing in it after the testator's death under a right given by the will which is subject to repairing and insuring, the beneficiary cannot take the benefit without accepting the burden, so the trustees could sue the beneficiary for reimbursement of insurance premiums or they or possibly the persons interested in remainder could sue the beneficiary's estate for compensation after his death if he had failed to keep the property in repair.⁶⁴⁹ The cases of *Re Williames*,⁶⁵⁰ *Jay v. Jay*,⁶⁵¹ *Re Field*⁶⁵² and *Haskell v. Marlow*⁶⁵³ are all cases concerning obligations to repair of tenants for life of settled land, but there is no reason why the benefit and burden principle set out in those cases should not apply equally to someone with a life interest occupying property held on a trust of land subject to obligations to repair reasonably imposed by trustees under section 13(3).

The 1996 Act makes no express provision as to how conditions imposed on occupying beneficiaries are to be enforced, but the terms of section 13(3) and (5) seem to imply that if a beneficiary breaks a condition reasonably imposed upon him, he will be personally liable. In practice the lack of any additional endowment will make it extremely difficult for the trustees to enforce the beneficiary's obligations, since there may be no funds even to pay for a simple application to the court for directions, without first selling the property.⁶⁵⁴ It should be explicit that trustees are

⁶⁴⁸ *Williams on Wills op. cit.*, para. 208.27.

⁶⁴⁹ *Williams on Wills op. cit.*, para. 208. 27.

⁶⁵⁰ (1885) 54 L.T. 105.

⁶⁵¹ [1924] 1 K.B. 826.

⁶⁵² [1925] Ch. 636.

⁶⁵³ [1928] 2 K.B. 45.

⁶⁵⁴ *Williams on Wills op. cit.*, para. 208.28.

not to be liable for any failure to enforce the beneficiary's obligations, although this would probably be implicit in trusts of this type.

Where an interest in possession is wanted for tax or other reasons, it would still be possible to include an overriding power of appointment which enabled the interest in possession to be terminated if the exercise by a beneficiary of the right of occupation was causing problems for the administration of the trust.⁶⁵⁵ Such a power could, if so exercised, apparently be effective to give the trustee a right to possession, but there might be tax or other reasons for not wanting to exercise the power in this way. If the trustee and beneficiary were already in dispute, the trustee would be open to accusations of improper use of the power.

Another possibility is to restrict liability to repair to keeping the property in the state it is in at the testator's death (where it is likely to be in a poor state of repair) and providing an endowment fund to pay for repairs and insurance.⁶⁵⁶ This could be adopted in *inter vivos* settlements as well. The most direct solution, however, would be a conditional interest in possession, which would fortify the trustees' position as well as that of remaindermen, yet few settlors and draftsmen have the foresight to adopt such drafting, which could have numerous pitfalls. A determinable interest in possession may be preferable, because it automatically determines when the specified event occurs.⁶⁵⁷

Section 13(6) provides that, 'Where the entitlement of any beneficiary to occupy land under section 12 has been excluded or restricted, the conditions which may be imposed on any other beneficiary under subsection (3) include, in particular, conditions requiring him to- (a) make payments by way of compensation to the beneficiary whose entitlement has been excluded or restricted, or (b) forgo any payment or other benefit to which he would otherwise be entitled under the trust so as to benefit that beneficiary.' As Barnsley expostulates,⁶⁵⁸ there is a total air of unreality about the concept of a trustee exercising his statutory power under section 13(6) to

⁶⁵⁵ *Williams on Wills op. cit.*, para. 208.18 point (4).

⁶⁵⁶ See *Williams on Wills op. cit.*, para. 208.28.

⁶⁵⁷ See Megarry and Wade *op. cit.*, paras. 3-062-3-077.

⁶⁵⁸ *Op. cit.*, p. 140.

impose a condition upon himself, qua 'any other beneficiary', to make such payments. As Barnsley points out, in fact section 13(6) does not specify that 'any other beneficiary' must be in occupation, though it must be assumed that the beneficiary must be in occupation.⁶⁵⁹

Barnsley is correct that if the trustee refuses to pay or makes an unsatisfactory offer of compensation, there is no provision in the Act enabling a beneficiary to challenge the trustee's decision. There are two possible grounds of challenge: the refusal to pay compensation may be a breach of trust or the act of exclusion would be tantamount to an ouster under the general law (though the mere fact that there has been no ouster or forceful exclusion is 'far from conclusive'⁶⁶⁰), thus enabling the excluded party to sue for an occupation rent assuming, as Barnsley does, that this right survives the Act.

Where a beneficiary leaves because the conditions for living in the property have become so intolerable and the sole trustee in occupation refuses to pay an occupation rent, since a trustee in such circumstances will not have exercised its power under section 13(1) to exclude a beneficiary, no compensation is payable under section 13(3). However, as Barnsley argues,⁶⁶¹ this would constitute a constructive ouster, which would entitle the beneficiary to compensation at common law. Such a residuary jurisdiction must remain because it is not covered by the statutory provisions.

One problem which Barnsley highlights is how the Act is singularly unhelpful in making any provision for non-compliance with reasonable conditions imposed by trustees under section 13(3).⁶⁶² The scenario which Barnsley discusses is where A and B vacate the property and they allow C to move in but refuse to permit D to occupy it on reasonable grounds. If the trustees under section 13(6)(a) require C to make

⁶⁵⁹ *Op. cit.*, p. 135 footnote 48.

⁶⁶⁰ *Re Pavlou* [1993] 1 W.L.R. 1046 at 1050 and see Gray and Gray *op. cit.*, p. 842. 'Only in cases where the tenants in common not in occupation were in a position to enjoy their right to occupy but chose not to do so voluntarily, and were not excluded by any relevant factor, would the tenant in common in occupation be entitled to do so free of liability to pay an occupation rent': *Dennis v. McDonald op. cit.*, at 71. See also *Re Byford* [2003] E.W.H.C. 1267, 2003 WL 21236537 para. 40, where Lawrence Collins J. stressed that, 'What the court is endeavouring to do is broad justice or equity as between co-owners. As Millett J. said in *Re Pavlou*, the fact that there has not been an ouster or forcible exclusion is not conclusive.'

⁶⁶¹ *Op. cit.*, p. 140-141.

⁶⁶² *Op. cit.*, p. 142 footnote 69.

compensation payments to D and C declines to make the payments to D, Barnsley asserts that D appears to have no claim under the Act against C. D is obliged to call upon A and B to take action on his behalf against C and as Barnsley claims, the Act is unhelpful in making provision for non-compliance.

The correct procedure is for the trustees to take action against C and it is unclear why Barnsley states that it does not appear that the trustees can sue C for non-payment. Barnsley is too dogmatic in his view that D has no claim under the Act against C. There is a possibility that D may have *locus standi* under section 13(6)(a) against C. Barnsley's suggested solutions are for D to claim an occupation rent from C under general principles or seek a court order to gain occupation of the property, both of which may not be successful, since it is the trustees and not C who made the decision to exclude D. Barnsley does not mention the possibility that D may be able to sue C under the Contracts (Rights of Third Parties) Act 1999 on the basis that there is a contract which is binding on C which purports to confer a benefit on D.

Clear criteria for exercise of trustees' discretion?

Section 13(4) states that, 'The matters to which trustees are to have regard in exercising the powers conferred by this section include- (a) the intentions of the person or persons (if any) who created the trust, (b) the purposes for which the land is held, and (c) the circumstances and wishes of each of the beneficiaries who is (or apart from any previous exercise by the trustees of those powers would be) entitled to occupy the land under section 12.' Kenny and Kenny recognise that section 13(4) is possibly some help in drafting trust instruments with factors (a) and (b) being spelled out in the trust instrument.⁶⁶³

Hudson argues⁶⁶⁴ that all that the section 13 power to exclude achieves is the application of the purposes of the trust. The problem is how to discover these intentions and purposes where they are not spelled out, which is the case in virtually all trusts existing at the date of the Act. Hudson suggests that they could be divined in the same manner as a common intention is located in a constructive trust over a home.

⁶⁶³ *Op. cit.*, p. 19.

⁶⁶⁴ *Op. cit.*, para. 16.2.3.

Thompson highlights⁶⁶⁵ the potential conflict between section 13(4)(a) and (b) with (a) relating to the purpose of the trust at the time of its creation and (b) to the current position. It is likely that these criteria will enable the courts to take a broad approach.

In paragraph (b) the trustees are not directed to have regard to the purposes of the trust, which are the criteria in section 12(1)(a), but rather the purposes for which the land is held. As Peter Gibson L.J. stated in *Rodway v. Landy*⁶⁶⁶ in relation to section 15(1)(b),⁶⁶⁷ the present tense 'shows that the relevant purposes are those subsisting at the time the court is determining the application.' Barraclough and Matthews are of the view⁶⁶⁸ that the test in section 13(4)(b) is rather closer to that considered by the courts in the case law in cases such as *Re Buchanan-Wollaston's Conveyance*⁶⁶⁹ and *Jones v. Challenger*.

Analysing these judgments it is difficult to be as dogmatic and categorical as Barraclough and Matthews. In *Re Buchanan-Wollaston's Conveyance* Sir Wilfred Greene M.R. delivering the judgment of the court spoke of 'the purpose of carrying out a trust'.⁶⁷⁰ In *Jones v. Challenger* Devlin L.J. spoke of the 'purpose of the joint tenancy',⁶⁷¹ 'the prime object of the trust' and 'the true object of the trust'.⁶⁷² These are closer to the criteria in section 12(1)(a) rather than the factors in section 13(4). The real difference is that 'purposes for which the land is held' are wider and may be more liable to change than 'purposes of the trust', although in many cases they will amount to the same factors being taken into account and to the same result.

The provisions governing the trustees' powers to regulate occupation must be seen as imposing a corresponding restriction on the settlor's control over whether, and by whom, land is occupied.⁶⁷³ A right to occupy can be claimed despite this not being the

⁶⁶⁵ *Modern Land Law op. cit.*, p. 304-305.

⁶⁶⁶ *Op. cit.*, para. 26. In *Rodway v. Landy* itself, the present prevailed over the past: see *Emmet and Farrand on Title op. cit.*, R. 46 para. 22.034.

⁶⁶⁷ '(b) the purposes for which the property subject to the trust is held'.

⁶⁶⁸ *Op. cit.*, para. 8.5 and footnote 15.

⁶⁶⁹ [1939] Ch. 738.

⁶⁷⁰ *Op. cit.*, p. 746.

⁶⁷¹ *Op. cit.*, p. 183.

⁶⁷² *Op. cit.*, p. 184.

⁶⁷³ See Hopkins *The Trusts of Land and Appointment of Trustees Act 1996 op. cit.*, p. 421.

purpose of the trust if the land is available for occupation. A settlor cannot compel sale and postponing sale is not a breach of trust, even though the land may thereby be available for occupation, enabling a beneficiary to claim a right to occupy. However, where there is more than one beneficiary with a right to occupy, any direction from the settlor as regards who can occupy should be complied with if compatible with and balanced against the other factors specified in section 13(4).

Hopkins concludes that because as a general rule the trustees cannot act in contravention of any rule of law or equity, that subject to *Saunders v. Vautier*, it would be a breach of a rule of equity by being in breach of trust for trustees to exercise a discretion in a manner contrary to an express direction by the settlor.⁶⁷⁴ The problem with this view, however, is that if the trustees have justification in balancing the other factors in section 13(4) to act contrary to the settlor's wishes, there can be no breach of trust. Since there is no indication in section 13(4) of the weight to be attached to each factor, the trustees are left with wide discretion to give priority to section 13(4)(c) and ignore the settlor's intentions under section 13(4)(a). A settlor needs to be advised that the purposes of the trust must be drafted in such a way in the trust instrument to exclude the right arising *ab initio* under section 12(1).

An additional right to occupy?

Section 13(7)(a) limits the power of trustees to exclude a beneficiary from occupation. Section 13(7) provides that, 'The powers conferred on trustees by this section may not be exercised- (a) so as to prevent any person who is in occupation of land (whether or not by reason of an entitlement under section 12⁶⁷⁵) from continuing to occupy the land, or (b) in a manner likely to result in any such person ceasing to occupy the land, unless he consents or the court has given approval.' Lightman J. in *I.R.C. v. Eversden*⁶⁷⁶ noted in his judgment that, 's 13(7) does not (as was suggested at one time in argument) notwithstanding non-compliance with either condition confer entitlement to occupation on the settlor by reason of the fact that she was a tenant in common in occupation when the 1996 Act came into force: s 13 confers on trustees

⁶⁷⁴ *Ibid.*, p. 421.

⁶⁷⁵ It may arise on some other basis such as matrimonial home rights conferred by the Family Law Act 1996: see Gray and Gray *op. cit.*, p. 895 footnote 14.

⁶⁷⁶ *Op. cit.*, para. 25.

powers to exclude or restrict occupation where two or more beneficiaries are entitled to occupy land, and s 13(7) imposes limits on those powers.’⁶⁷⁷ This is correct and consistent with the principles introduced by the 1996 Act, although it is unfortunate that the Court of Appeal in *Eversden* did not comment on the 1996 Act.⁶⁷⁸

The termination of a beneficiary’s occupation is made more difficult under the 1996 Act than it was under trusts for sale with a power to permit residence before 1 January 1997.⁶⁷⁹ Under the latter, the trustee could revoke the permission to reside and bring a possession action, whereas now the trustee will have to apply under sections 13(7) or 14 if there is some strong reason for the occupation to cease, such as the beneficiary is disabled or the house is falling into disrepair and the beneficiary will not co-operate or is failing to fulfil obligations reasonably imposed by the trustee as a condition of occupation.

It is an inevitable consequence of conferring a right on a beneficiary under section 12 that terminating such a right may involve an application under section 14, but this is not to be condemned. It may be a defect in drafting that the right to occupy is not made conditional on observing the conditions reasonably imposed by the trustees under section 13(3) and the trustees cannot keep a beneficiary out of occupation while they decide on what conditions to impose. The trustees may find that they have a more limited power to impose conditions if a beneficiary is in occupation than if he is not.

Martyn presents a radical view that section 13(7) in a sense creates another entitlement to occupy, different and stronger than that given by section 12, because the requirements of purpose, availability and suitability in section 12 do not need to

⁶⁷⁷ Section 13(7) did not apply to the facts of the case, since there was no question of more than one individual being entitled prospectively to occupation, but as Jeremy de Souza noted in *Essex Lass Wins Again* (2002) 149 Taxation 537 at 539 in different circumstances, section 13(7) may create additional problems.

⁶⁷⁸ De Souza in *Another Win for ‘Essex’ Lass* (2003) 151 Taxation 322 at 323 regrets that the Court of Appeal did not have the opportunity to comment on Lightman J.’s observations on the effect of the enactment of the 1996 Act on the inheritance tax code and advocates that clarification in this area is urgently needed.

⁶⁷⁹ *Williams on Wills op. cit.*, para. 208.11.

be met, since mere occupation is enough.⁶⁸⁰ Furthermore, once that mere occupation exists, only the court can bring it to an end against the wishes of an occupier under section 14 taking into account the guidelines in section 15. Martyn's opinion is that now that there is no trust for sale, the court may well be less willing to order a sale than it was under the old law. To the extent that it is, the occupier who can rely on section 13(7) will be better placed than he was before. His view is that occupation will be nine points of the law and of equity.

This argument is conceptually flawed, since it is not an independent right in itself as is evident from section 13(7). It does not confer a right on a beneficiary *in limine*. It does not create a right for 'any person who is in occupation of the land' being a shield rather than a sword, since it specifies whom the beneficiaries may not exclude. The right itself can only be conferred by section 12 and it is irrelevant that purpose, availability and suitability in section 12 do not need to be met. These factors are pertinent in establishing a right *ab initio* under section 12. If such a right is not established, section 13(7) is irrelevant.

What Martyn does not discuss is that section 13(7) is in fact incongruous, because section 13(1) does not give trustees power to exclude 'any person who is in occupation of land (whether or not by reason of an entitlement under section 12)'. There is, therefore, no question of such a person who does not fall under the criteria of section 13(1) being excluded. Section 13(1) is silent on the point, thus raising a *prima facie* assumption that trustees have no such power. What section 13(7) does is to protect *de facto* occupation of any person in occupation giving such persons potentially greater rights than a beneficiary entitled to an interest in possession. Purpose, availability and unsuitability are irrelevant once a person is in occupation. It does not create another or greater entitlement to occupy, because it is a continuation of the law prior to 1997. The person in occupation of the land need not actually be a beneficiary under the trust and could be the spouse or cohabitee of one of the co-owners of the property.⁶⁸¹

⁶⁸⁰ *Op. cit.*, p. 262.

⁶⁸¹ See Thompson *Modern Land Law op. cit.*, p. 305.

What section 13(7) does not do is create a proprietary right for such persons. It gives protection and at most, a limited right to occupy until a court order is obtained. It merely prevents trustees from excluding without a court order or consent. Kenny and Kenny take the sardonic view of section 13(7) and (8)⁶⁸² that these subsections give support to the view that section 13 as a whole is not involved with a world of reality.⁶⁸³ Their view is that the fetter it imposes on a trustee's discretion is so great that it will be either ignored or litigated. This cynical view of these subsections ignores the reality of what subsection (7) is trying to achieve, misinterprets its scope and is a superficial gloss on its significance.

Some tax consequences of section 13

In exercising their powers under section 13, trustees will have to be careful not to accidentally destroy a beneficiary's interest in possession for inheritance tax purposes.⁶⁸⁴ Chris Jarman in *Q & A*⁶⁸⁵ stated that the Inland Revenue accepts that an exclusion under section 13 powers, by itself, would not necessarily affect the nature of the excluded beneficiary's interest, thus leaving the excluded beneficiary with a beneficial interest in possession in the land. The Inland Revenue does not, however, agree with the general proposition that the exclusion could in no circumstances have that effect.

The Inland Revenue's view is that the precise implications of any exercise of the particular powers would need to be considered in the light of all the relevant facts, including the various matters to which trustees are required to have regard under section 13(4). The amount of the compensation payable to the excluded beneficiary could be an important factor and a beneficiary's decision to forgo his right of occupation, where the trustees have not used their powers to exclude either beneficiary, might amount to a disposal of his interest in possession.⁶⁸⁶ The Inland Revenue gave answers to various questions and examples posed by Chris Jarman and prefaced its comments by emphasising that their replies are necessarily provisional.

⁶⁸² Section 13(8) states that, 'The matters to which the court is to have regard in determining whether to give approval under subsection (7) include the matters mentioned in subsection (4)(a) to (c).'

⁶⁸³ *Op. cit.*, p. 19.

⁶⁸⁴ See Barraclough and Matthews *op. cit.*, para. 8.7.

⁶⁸⁵ *Op. cit.*, p. 19.

⁶⁸⁶ See the second part of Chris Jarman's two-part article *More Qs and As* (1997) 390 Tax Journal 19.

The Inland Revenue stressed that it is not possible or appropriate to express any final view on hypothetical situations, especially as so much would depend on the precise facts of particular cases.

Section 13(6) will have important tax implications, since the Inland Revenue will regard any compensation paid as taxable income under Schedule A if the non-occupying beneficiary were a party to the decision to the exclusion from occupation of the land.⁶⁸⁷ The Revenue will not allow any deduction on the part of the paying beneficiary if the beneficiary does not occupy the land for the purposes of a trade. Where an occupying beneficiary has to forgo a payment in favour of a non-occupying beneficiary, the income forgone is likely to be the income of the beneficiary who becomes entitled to receive it, but this will depend on the facts of the particular case.⁶⁸⁸

If the diversion of income at the full market rate can properly be construed as a purely administrative adjustment to the distribution of trust income, the nature of the beneficiaries' respective interests seems unlikely to be affected if the value of those interests remains unchanged.⁶⁸⁹ There is no substantive conflict between the Inland Revenue's approach under the Statement of Practice of October 1979 and the concept behind sections 12 and 13.⁶⁹⁰ Where the exercise of a wide fiduciary power to permit occupation of trust property had the effect of terminating a person's existing interest

⁶⁸⁷ This should be contrasted with the view of C.J. Whitehouse *Taxation Aspects of the Right to Occupy Trust Land* (1997) 113 L.Q.R. 211 at 212 where he states that given that the payments are likely to be continuing, the correct analysis may be that they are annual payments in the recipient's hands and accordingly taxable under Schedule D Case III. He queries whether basic rate tax falls to be deducted at source by the payer when he makes the payment. See also *The Encyclopaedia of Forms and Precedents* Vol. 40(2) *op. cit.*, para. 468.1 [3252].

⁶⁸⁸ Issue No. 389 *op. cit.*, p. 20.

⁶⁸⁹ See Issue No. 390 *op. cit.*, p. 19.

⁶⁹⁰ See Issue No. 390 *op. cit.*, p. 19-20. De Souza comments (2002) 149 Taxation 537 *op. cit.*, at 539 that in the *Eversden* case, an alternative point which was open to the Revenue to take was that by reason of Inland Revenue Statement of Practice 10/79, the settlor should be deemed to have acquired an interest in possession in the 95 per cent interest held by the trustees. In the light of *I.R.C. v. Lloyds Private Banking Ltd* [1998] S.T.C. 559, a previous decision of Lightman J., it may be thought surprising that this possibility was not raised in the Notice of Determination. De Souza's view is that its absence may indicate a reluctance by the Revenue to expose that Statement of Practice to the judicial scrutiny which many practitioners believe it would not survive. See also Malcom Gunn *Mr Clegg's Law* (2004) 153 Taxation 183 who also criticises the Statement of Practice and regards *Eversden* as a missed opportunity to hold the Statement of Practice up to scrutiny.

in possession in the particular property, it would also extinguish his entitlement under section 12.

*Woodhall v. IRC*⁶⁹¹ considered the issue of a number of beneficiaries entitled to occupy a property where some live there and some do not and where the ones out of occupation are not formally excluded and retain the right of occupation. In *Woodhall* the issue concerned two remaining brothers who had rights of residence in a house (held on trust for sale), but only one lived there. The one who lived there had died in April 1997. It was held that he had an interest in possession in the house for inheritance tax purposes⁶⁹² within the meaning of section 49(1) of the Inheritance Tax Act 1984⁶⁹³ and that interest was limited to one half of the house within the meaning of section 50(5) of the same Act. This could offer a method of saving inheritance tax in some situations.

The Inland Revenue has said that depending on the full facts, a beneficiary's decision to forgo his right of occupation might amount to a disposal of his interest in possession,⁶⁹⁴ but the decision in *Woodhall* demonstrates that in a straightforward case of choosing not to occupy, there will be no disposal of the interest in possession which is the correct decision. *Woodhall* followed the decision of Lightman J. in *I.R.C. v. Lloyds Private Banking Ltd* and it is unfortunate that Lightman J. did not refer to the Privy Council decision in *Hayim v. Citibank*,⁶⁹⁵ where the testator's elderly brother and sister, who resided in the house under a clause permitting Citibank to permit the siblings to live there, did not have interests in possession in the house.

Whitehouse in *Woodhall- Interest in Possession or Not*⁶⁹⁶ questions what light the decision sheds on the position when two persons enjoy concurrent interests in

⁶⁹¹ [2000] S.T.C. (S.C.D.) 558.

⁶⁹² The Special Commissioner held that the will did not give the trustees a dispositive power to decide who should occupy the house alone if more than one wished to do so; rather it gave the trustees administrative powers to permit such of the trustees as desired to occupy the house to do so and if more than one, jointly with the other or others.

⁶⁹³ The decision in *Woodhall* is similar to the decision in *Faulkner v. I.R.C.* [2001] S.T.C. (S.C.D.) 112. See Lesley King *Probate Law* (2001) 98(41) L.S.G. 33.

⁶⁹⁴ See Jarman Issue 390 *op. cit.*, p. 19.

⁶⁹⁵ [1987] A.C. 730.

⁶⁹⁶ Chris Whitehouse [2001] P.C.B. 132 at 133-134.

possession in a dwelling house and the trustees exercise their powers under section 13 to permit one to occupy whilst providing compensation to the other. He states that it is thought that in such cases they both continue to enjoy interests in possession in the trust property and this is likely to be correct. He is right that if the non-occupier does not want to be compensated and is perfectly content to allow the other to occupy, then the position should be exactly the same and *Woodhall* affords support for this view.

Whitehouse then queries the position if the trustees determine that the occupation by one beneficiary of a house worth £1 million will be ‘compensated for’ by the other being given the income from the trust portfolio with a capital value of £750,000. His correct view is that on the basis that the section is not seeking to disturb the beneficial trusts, it is thought that each continues to be entitled to an interest in possession in 50 per cent of both the house and the portfolio. The view of Vaines in *Taxing Matters*⁶⁹⁷ is that it is going to need very careful drafting indeed to avoid creating an interest in possession when an interest in a property is left to a family member where they have any rights at all.

Conclusion

Sections 12 and 13 represent a judicious, though imperfect and problematic, innovation in statutory law in the context of trusts of land. Section 12(1) should be drafted to remove (a) and (b), since (b) is mostly superfluous and (a) should be incorporated into section 12(2). Section 12(1) should, therefore, state that, ‘A beneficiary who is beneficially entitled to an interest in possession in land subject to a trust of land is entitled by reason of his interest to occupy the land.’ It would be preferable for section 12(2) to declare that, ‘Subsection (1) does not confer on a beneficiary a right to occupy the land if at the time when the beneficiary wishes to occupy the land, (a) the purposes for which the property subject to the trust is held do not include making the land available for his occupation, or (b) the land is either unavailable or unsuitable for occupation by him.’ The wording in section 12(2)(a) would thus be consistent with the wording in section 15(1)(b).

⁶⁹⁷ P.S. Vaines (2001) 151 N.L.J. 301 at 302.

A new section 12(4) should specify that the statutory provisions supersede the common law and a new section 12(5) should clarify that, 'Subsection (1) does not apply in relation to a trust created by a disposition in so far as provision that it does not apply is made by the disposition.' Section 13(1) should be drafted to state in parenthesis '(but not all in the case of exclusion)' rather than '(but not all)' as at present. Section 13(3) should provide in addition that, 'Such conditions are to be enforceable by the trustees and any beneficiary in whose favour such conditions are imposed.' Section 13(4)(b) should be amended to refer to 'the purposes for which the property subject to the trust is held' to ensure consistency with section 15(1)(b). These amendments would represent an improvement to sections 12 and 13 within the context of the present statutory regime.

CHAPTER 9- POWERS OF THE COURT UNDER SECTIONS 14 AND 15- CONSOLIDATION AND RATIONALISATION OR INNOVATIVE CHANGE?

The 1996 Act has *prima facie* changed the juridical basis of the law from land being valued in terms of its exchange value under the 1925 legislation with its emphasis on alienability of real property to land being valued in terms of its 'use' value which is a policy departure in the 1996 Act with the establishment of the trust of land.⁶⁹⁸ In disputes purely between co-owners, without the intervention of any third party, the court may well be happy to postpone sale, because sale is not the preferred solution under the 1996 Act. The tension between the 'use' value and exchange value is predominant when a secured creditor seeks sale of the land against the wishes of the co-owners and their family.⁶⁹⁹ Whether section 15 effects a change in the law is central to the issue of how courts deal with disputes between the rights of secured creditors and the interests of occupiers in their homes.

Complications inherent in section 14?

Who can apply?

Section 14(1) states that 'Any person who is a trustee of land or has an interest in property'⁷⁰⁰ subject to a trust of land may make an application to the court for an order under this section.' Section 14 is drafted far wider than its predecessor section 30 of

⁶⁹⁸ Fox *Living in a Policy State: from Trust for Sale to Trust of Land op. cit.*, p. 81 states that the ethos of the legislation as a whole would certainly appear to indicate a movement away from the commercialism which characterised rulings under section 30. Yet Fox's view *op. cit.*, p. 78, 86 is that despite statutory intervention in the shape of the 1996 Act which indicates a significant legislative policy departure and a policy turning point with the trust of land being based on a completely different conception of the nature of co-owned property, the legislative policy of the 1925 Act and judicial adherence to its principles continues to influence the exercise of the judicial discretion to order the sale of land. If the tendency towards protecting occupation enshrined in the 1996 Act were to be embraced as wholeheartedly by the courts as the trend towards alienability was after 1925, the beneficial occupier would receive greater protection against eviction by creditors than was previously the case.

⁶⁹⁹ See Gray and Gray *Land Law* (Butterworths Core Text Series) (3rd edn 2003) para. 8.35.

⁷⁰⁰ Smith *Property Law op. cit.*, p. 320 states that, 'Apparently, a tenant or, say the holder of an easement could apply, whether or not their interests pre-date the trust. This is plainly not what the section was intended to achieve and it would be surprising if a court were to entertain actions from anybody save trustees, beneficiaries or persons with rights in a beneficiary's interest.' The problem with Smith's view is that a court would be obliged to entertain a *bona fide* action from such an applicant, although it is unlikely that such applicants would need to use section 14.

the Law of Property Act 1925,⁷⁰¹ which was unclear whether a trustee who had no beneficial interest in the property could apply under section 30.⁷⁰² Section 14(1) remedies this by the wide formulation which covers trustees,⁷⁰³ an interest in possession beneficiary, a remainderman (whether vested or contingent), a discretionary beneficiary,⁷⁰⁴ the secured creditor of a beneficiary, and trustees and beneficiaries of a sub-trust.

An annuitant whose annuity is paid out of the income of the property is probably included.⁷⁰⁵ This is despite section 22(3) which states that, 'For the purposes of this Act a person who is a beneficiary only by reason of being an annuitant is not to be regarded as entitled to an interest in possession in land subject to the trust.'⁷⁰⁶ As long as an annuitant has 'an interest in property subject to a trust of land', an annuitant will

⁷⁰¹ Section 30(1) stated that, 'If the trustees for sale refuse to sell or to exercise any of the powers conferred by either of the last two sections, or any requisite consent cannot be obtained, any person interested may apply to the court for a vesting or other order for giving effect to the proposed transaction or for an order directing the trustees for sale to give effect thereto, and the court may make such order as it thinks fit.'

⁷⁰² For a useful, brief summary of who could apply under section 30, see Megarry and Wade *op. cit.*, para. 8-142 footnote 65 and *Emmet and Farrand on Title* R. 46 para. 22.035.

⁷⁰³ See *Oke v. Rideout* (1998) 10 C.L. 559 where Mr Oke was only a trustee and sought a sale to release him from his obligations as mortgagor. The court refused to order sale as Mrs Rideout's interests greatly outweighed Mr Oke's interest. See also Malcolm Warner *Oke v. Rideout: orders for sale under TLATA 1996* (1999) 4 T.E.L.J. 18.

⁷⁰⁴ It should be noted that an object of a power of appointment does not have an interest in property and cannot apply. This is implicit from *Re Gestetner* [1953] Ch. 672, *McPhail v. Doultton*, *Re Manisty's Settlement* [1974] Ch. 17, *Re Hay's Settlement Trusts*. Prospective or presumptive next of kin and a potential future spouse do not have an interest, since they have only a '*spes successionis*, a hope of succeeding': see Warner J. in *Knocker v. Youle op. cit.*, at 937 in relation to section 1(1)(b) of the Variation of Trusts Act 1958. A gift to whomsoever shall at the death of B, a living person, be the heir of B or one of the next-of-kin of B, confers no interest on anyone until the death of B: see Stamp J. in *Re Middleton's Will Trusts* [1969] 1 Ch. 600 at 607.

⁷⁰⁵ The original Bill introduced in the House of Lords contained narrower wording. Clause 14(1) stated that, 'Any person who is a trustee of land or a beneficiary under a trust of land'. Lord Mackay said in the House of Lords Committee (H.L. Debs., Vol. 570 cols. 1542-1543) that clause 14(1) as currently drafted appears, *inter alia*, to exclude a secured creditor of a beneficiary. It is interesting to note that the wording in the Bill attached to the Law Commission Report, Law Com. No. 181 in clause 6, was less problematic because it stated that, 'Any person who is a trustee of land or is interested (whether beneficially or otherwise)'. Barraclough and Matthews argue *op. cit.*, para. 9.2 that the amendment in the House of Lords Committee expressly to widen the range of persons who could apply to the court, in particular to cover a creditor of a beneficiary who obtained a charging order over his interest under the trust, meant that if such a person is to be included, then so must be an annuitant. See also Saskia Thornton *Section 14- effect and interpretation* [1999] 23 P.L.J. 16 at 17.

⁷⁰⁶ Section 22(3) alters the previous law because under the Law of Property Act 1925, an annuitant whose annuity was to be paid out of the income of land was a person beneficially entitled in possession- *Re House* [1929] 2 Ch. 166: see Barraclough and Matthews *op. cit.*, para. 1.11. The Law Commission does not discuss why this change has been made. See Barraclough and Matthews *op. cit.*, para. 7.6 who state that it is possible that the draftsman foresaw difficulties with, for example, pension trust beneficiaries who had become entitled to annuities.

be able to apply under section 14. 'An interest in property subject to a trust of land' is likely to be widely interpreted and include personal property.⁷⁰⁷ It is arguable that where there is a trust of the matrimonial home, a spouse who enjoys no beneficial entitlement under the trust might nevertheless be a person who has an interest in the property for the purposes of section 14(1) in view of the matrimonial home rights conferred by Part IV of the Family Law Act 1996 and also perhaps because of the judicial powers conferred by section 24 of the Matrimonial Causes Act 1973.⁷⁰⁸ A person interested in a trust of the proceeds of sale of land can also apply under section 14.⁷⁰⁹

Scope of section 14

Section 30 did not permit applications to prevent a sale or prevent the exercise of a power. Section 14(2)(a) is very wide, reflecting the Law Commission's view that courts should be able to intervene in any dispute relating to land,⁷¹⁰ apart from the appointment or removal of trustees.⁷¹¹ Section 14(2) states that, 'On an application for an order under this section the court may make any such order- (a) relating to the exercise by the trustees of any of their functions (including an order relieving them of any obligation to obtain the consent of, or to consult, any person in connection with the exercise of any of their functions)as the court thinks fit.' The wording 'relating to the exercise by the trustees of any of their functions' is, *prima facie*, far-reaching and comprehensive.

⁷⁰⁷ Since a mixed trust comprising both land and personal property comes within the definition of 'trust of land', a person who has an interest in the personal property but not the land under such a trust will be able to apply for an order: see the *Notes on Clauses op. cit.*, para. 151. See also Megarry and Wade *op. cit.*, para. 8-142 footnote 72.

⁷⁰⁸ See *Emmet and Farrand on Title op. cit.*, R. 46 and 47 para. 22.035. See discussion of *Re Beesley* [1975] 1 W.L.R. 568 where it was held that a spouse was not 'any person interested' by reason only of matrimonial status so as to be able to apply for the annulment of the bankruptcy of the other spouse under section 29(1) of the Bankruptcy Act 1914. *Emmet and Farrand on Title* expresses the view that this decision is unlikely to succeed in this context, since *Re Beesley* was confined to the statutory provision, which anyway is now repealed and not replaced, and there is no restriction on who may apply for an annulment under section 282 of the Insolvency Act 1986.

⁷⁰⁹ By virtue of section 17(2), section 14 applies to a trust of the proceeds of sale of land as it does to a trust of land, which was not the position under the old section 30. 'Proceeds of sale of land' includes 'any property representing such proceeds' under section 17(3)(b). There is no requirement that the proceeds have been further invested in land and this would enable an application to be made where, for example, shares have been purchased with the proceeds of sale of the land: see Kenny and Kenny *op. cit.*, p. 20.

⁷¹⁰ See Law Com. No.181 para. 12.6 and Kenny and Kenny *op. cit.*, p. 20.

⁷¹¹ Section 14(3) and see sections 19 and 20.

The heading in the Act ‘Functions of trustees of land’ covers sections 6 to 9⁷¹² and, even though section 13 is not included in this heading, section 15(2) makes it clear that decisions as to occupation are ‘functions’.⁷¹³ Section 14 therefore applies to applications under section 13 and cannot be limited to those sections with the heading.⁷¹⁴ This raises interesting questions as to the extent of the court’s powers under section 14: can it order a beneficiary who is entitled to occupy under section 12 (and not covered by section 13) to give up occupation?⁷¹⁵ If the trustee does not have the power to order a beneficiary out, a court should not be able to do so, because the wording of section 14 is not wide enough to enable a court to deny a beneficiary his or her statutory rights under section 12. Section 15(2) does not envisage this nor does section 14(2). Yet if a court ordered sale under section 14, an incidental effect of this would be for a beneficiary to cease occupation.⁷¹⁶

Section 14(2) states that, ‘On an application for an order under this section the court may make any such order-.....(b) declaring the nature or extent of a person’s interest in property subject to the trust, as the court thinks fit.’ Section 14(2)(b) cannot be construed as giving the court discretion to vary the rights of any person, because it states ‘declaring’ and it seems improbable that the court was intended to have a discretion to vary such rights.⁷¹⁷ The court is merely given a discretion whether to make the order or not.⁷¹⁸ Support for the view that section 14(2)(b) does not give the court a discretion to vary rights can be derived from Neuberger J. in *Mortgage Corporation Ltd v. Shaire*⁷¹⁹ who stated that, ‘I do not think it is appropriate to treat the court’s role, in deciding in what shares the beneficial interest in a property is held,

⁷¹² Section 6- general powers of trustees, section 7- partition by trustees, section 8- exclusion and restriction of powers, section 9- delegation by trustees.

⁷¹³ See Smith *Property Law op. cit.*, p. 320 footnote 126.

⁷¹⁴ This is also shown by the consent and consultation provisions included in section 14(2)(a) which are based on functions contained in sections 10 and 11.

⁷¹⁵ See Smith *Property Law op. cit.*, p. 320.

⁷¹⁶ Smith, however, argues in *Property Law op. cit.*, p. 321 that a court should not be able to do this, because the fact that specific provision is made in section 14(2) for cases where consents are unobtainable, implies that the courts cannot override rights of the beneficiaries and it would be wrong to interpret section 14, even with its opaque reference to functions, as a basis for denying statutory rights.

⁷¹⁷ The original clause 6 of the Bill annexed to the Law Commission Report No.181 was narrower and better drafted: ‘On an application under this section the court may make such order as it thinks fit-.....(b) for the settlement of any dispute which has arisen concerning the trust or the land subject to it.’

⁷¹⁸ See Whitehouse and Hassall *op. cit.*, para. 2.148.

⁷¹⁹ [2000] 1 F.L.R. 973 at 985.

as involving some sort of roving commission.’ Mummery L.J. in *Dear v. Robinson*⁷²⁰ refers to Rudd J. at first instance who noted that he had no power to alter the beneficial interests and Mummery L.J. did not contradict this statement. The criteria in section 15(1) are not to be used in deciding whether people have equitable interests⁷²¹ and were not used in *Oxley v. Hiscock*.⁷²² Equitable interests are to be decided in accordance with property law principles.

The provisions of section 14(2)(b) will most usually be needed where there is a claim to an interest in property under a resulting or constructive trust. As Cazalet J. stated in *A v. B*,⁷²³ ‘Section 14(2)(b) enables the court to declare the nature or extent of the person’s interest in the property subject to the trust. This means that in cases where an interest in the property arises under a resulting or constructive trust, there is power in the court under that section to make the appropriate declaration.’ Recourse will still be had to the case law to decide whether a claimant has an interest and the type of interest.⁷²⁴ Section 14, like section 30 of the Law of Property Act 1925⁷²⁵ and section 17 of the Married Women’s Property Act 1882,⁷²⁶ does not confer an unfettered discretion on the court.⁷²⁷

⁷²⁰ [2001] E.W.C.A. Civ. 1543, 2001 WL 1251817 para. 14. Mummery L.J. reversed the judge’s order for an immediate sale of the property and remitted the case to the county court to determine the terms on which Mr Dear should continue to occupy the property.

⁷²¹ See P.H. Kenny *Married Women Still Exist?* [1998] Conv. 2 at 3, describing this as infelicitous drafting.

⁷²² [2004] E.W.C.A. Civ. 546, [2004] E.G.C.S. 166. 2004 WL 1074174 para. 69. Title to the home was registered in the sole name of Mr Hiscock, but both Mr Hiscock and Ms Oxley contributed to the purchase and outgoings on the property without agreeing the extent of their respective shares. The Court of Appeal held that Ms Oxley was entitled to 40% of the proceeds of sale and Mr Hiscock 60%.

⁷²³ Unreported, 23 May 1997, LexisNexis p. 8 in which it was held that the claimant was entitled to a beneficial interest amounting to 25 per cent of the value of the property.

⁷²⁴ See Kenny and Kenny *op. cit.*, p. 20-21. Their view is that the provisions would be used in cases such as *Huntingford v. Hobbs* [1993] 1 F.L.R. 736 where the court had to decide whether the registered proprietors were joint tenants or tenants in common.

⁷²⁵ Under section 30 it was settled that the court had no such power to vary the beneficial interests of the parties: see *Stott v. Ratcliffe* (1982) 126 S.J. 310 and *Ahmed v. Kendrick* (1987) 56 P.& C.R. 120 at 127.

⁷²⁶ The House of Lords in *Pettitt v. Pettitt* [1970] A.C. 777 held that section 17 was a procedural provision only and did not entitle the court to vary the existing proprietary rights of the parties, overruling the contrary view of Lord Denning M.R. in *Hine v. Hine* [1962] 1 W.L.R. 1124 at 1127-1128 and *Appleton v. Appleton* [1965] 1 W.L.R. 25 at 28.

⁷²⁷ If a cohabitee has paid part of the purchase price, so giving rise to a presumed resulting trust, the courts are now prepared to find that this indicates a common intention to have a fair share and so gives rise to a right to a fair share: Chadwick L.J. in *Oxley v. Hiscock op. cit.*, paras. 69-71 and Waite L.J. in *Midland Bank v. Cooke* [1995] 2 F.L.R. 915 at 926. See Simon Edwards *Property Rights in the Family Home- Clarity at Last* [2004] Fam. Law. 524, Richard Adkinson *Cohabitee Rights* (2004) 154 N.L.J. 952 and Susan Spencer *Divide and conquer* (2004) 101(25) L.S.G. 28.

It has been suggested that the 1996 Act, by enabling the court to make such order as the court thinks fit, will have a major impact in the field of property disputes, especially between co-owning cohabitants, if the judiciary takes a robust stand on the new powers available to them, so that increased power and discretion of the courts may be utilised to benefit cohabiting clients.⁷²⁸ But this is to overstate the effect of the Act, which has not been utilised by the courts in this way under section 30 of the Law of Property Act 1925 or section 17 of the Married Women's Property Act 1882, and the judiciary is unlikely to oblige in this way. Inglis argued⁷²⁹ that the court has a discretion to decide that the respective interests of the parties are different at the time the application is determined from those agreed when the trust was created, which would involve a radical reinterpretation of the law as it relates to trusts in land and would enable the courts to distribute real property on the breakdown of relationships between gay and unmarried couples fairly. He concludes by stating that, 'A reinterpretation of ss 14 and 15 of the Trusts of Land Act 1996 may provide the courts with the discretion to ensure a fair distribution of real property when gay, lesbian and unmarried couples separate.'⁷³⁰ Inglis' contentions, however, have no foundation in authority and no substance in law.

Other jurisdictions?

In disputes between husband and wife where there are no third party interests, the only relevant legislation is sections 22 to 25 of the Matrimonial Causes Act 1973 not the 1996 Act.⁷³¹ There is no reason why section 17 of the Married Women's Property Act 1882 Act should not still apply to land,⁷³² although it may no longer be used as a jurisdiction since it has fallen into disuse. Kenny inquires whether the fact that the criteria in section 15 of the 1996 Act do not apply to applications under section 17 of the 1882 Act will prove a purely academic point or lead to a difference in principle.⁷³³

⁷²⁸ See Margaret Rodgers and Anne Davies *Trusts of Land: New Act* (1997) 94(3) L.S.G. 30.

⁷²⁹ Alan Inglis *We are Family? The Uneasy Engagement between Gay Men, Lesbians and Family Law* [2001] Fam. Law 830 at 834.

⁷³⁰ *Ibid.*, at 834.

⁷³¹ See *Tee v. Tee* [1999] 2 F.L.R. 613 at 619 per Thorpe L.J.

⁷³² See P.H. Kenny in *Married Women Still Exist? op. cit.*, p. 3 who states that section 17 of the 1882 Act applies to property other than land and may still be needed in these cases.

⁷³³ *Ibid.*, p. 3. It is likely that the same principles apply to all property disputes whatever the procedure—see *Pettitt v. Pettitt* and *Gissing v. Gissing* [1970] 2 All E.R. 780, thus the existence and size of property interests will continue to be decided on basic property principles.

It is likely to be a purely academic point since section 17 will lie dormant and become otiose.⁷³⁴

Smith questions whether it is appropriate to consider section 14 applications between cohabitants, given that occupation disputes have a more appropriate forum under the Family Law Act 1996.⁷³⁵ He is right that two statutes enacted at the same time fail to clarify this.⁷³⁶ The criteria to be taken into account both as regards occupation and compensation differ under the two statutes and this opens the spectre of different results according to which route is taken. Probert highlights similarly how in some contexts both property law and family law are applicable to the same dispute and may provide different answers.⁷³⁷ At first instance in *Chan Pui Chun v. Leung Kam Ho* the relationship between section 33 of the Family Law Act and sections 14 and 15 was considered in determining occupation of the home and McGonigal J. purported to apply both simultaneously,⁷³⁸ which merely served to highlight the differences

⁷³⁴ See *Williams v. Williams* [1976] Ch. 278, *Laird v. Laird* [1999] 1 F.L.R. 791, *Tee v. Tee* and *Le Foe v. Le Foe* [2001] 2 F.L.R. 970.

⁷³⁵ *Property Law op. cit.*, p. 326. Smith suggests p. 312 suggests that due to the pronouncement of the Court of Appeal in *Williams v. Williams op. cit.*, at 286 that applications should be made in the Family Division where the matrimonial legislation would be fully taken into account, that this is a possible pointer to the use of the Family Law Act 1996 in preference to the trust of land powers whenever the co-owners are spouses or cohabitants, though he questions in footnote 64 whether it could be argued that orders under the Family Law Act are likely to be for shorter periods and therefore longer-term disputes are properly dealt with under the trust of land provisions. John Dewar *Land, Law, and the Family Home in Land Law Themes and Perspectives op. cit.*, ch. 13 at p. 338-339 comments that there is likely to be an element of jurisdictional arbitrage as litigants seek to argue their case under whichever statutory jurisdiction they consider most favourable to their cause.

⁷³⁶ *Property Law op. cit.*, p. 312.

⁷³⁷ Rebecca Probert *Family law and property law: competing spheres in the regulation of the family home* in *New Perspectives on Property Law, Human Rights and the Home* edited by Alastair Hudson (2004) ch. 2.

⁷³⁸ *Op. cit.*, p. 758-761. McGonigal J. *op. cit.*, p. 754 preferred the jurisdiction under section 33 of the Family Law Act on the issue of occupation, because it is that Act of Parliament which addressed the issue of occupation in most detail. Since the court is required by section 33(6) to have regard to all the circumstances, these will include the fact that it is a trust property, so that sections 14 and 15 apply to it. In the Court of Appeal Jonathan Parker L.J. did not consider the overlapping jurisdictions of section 33 and sections 14 and 15 and limited himself to considering *op. cit.*, paras. 100-103 the issue of whether the house was unsuitable for occupation by Miss Chan under section 12.

between them.⁷³⁹ Probert doubts whether the court would have achieved the result which it did by simply applying the test in the Family Law Act.⁷⁴⁰

Hudson highlights⁷⁴¹ how the legal treatment of the family home is typically fragmented between many well-established legal categories with the consequence that different areas of the law treat disputes as to the family home in radically different ways. The relevant contexts may be trusts law, land law, family law,⁷⁴² social security law⁷⁴³ or housing law, each of which is founded on distinct norms. He is right that, ‘there is a hotchpotch of rules and regulations coming at the same problem from different directions. A comprehensive legislative code dealing with title to the home, the rights of occupants, the rights of children and the rights of creditors is necessary to reduce the cost and stress of litigation, and to ensure that this problem is given the political consideration that it deserves.’⁷⁴⁴

Does section 15 change the law?

The imposition of a duty to sell under the trust for sale under section 30 of the Law of Property Act 1925 led to courts seeking to neutralise this artificiality by developing the principle of collateral purpose⁷⁴⁵ to give recognition to the use value of land. Where that purpose still existed, the court might refuse to order a sale in the exercise of its discretion under section 30 of the Law of Property Act 1925.⁷⁴⁶ Since the court’s starting point has always been that there is a duty to sell, this has confined the

⁷³⁹ See Probert *op. cit.*, p. 37 and 44-46. Probert *op. cit.*, p. 46 compares the courts’ contrasting jurisdictions. Under the Family Law Act the court views the matter of infringing a property right on the basis of purely personal, status-based rights and regards an occupation order as draconian even if the person seeking the order has an interest in the property. By comparison under section 14 the court emphasises entitlement to occupy the property and considers possession of a property right as conferring an advantage.

⁷⁴⁰ *Op. cit.*, p. 46.

⁷⁴¹ *Op. cit.*, para. 16.1.

⁷⁴² See Hudson *op. cit.*, paras. 16.3.1-16.3.4 on family law and the law of the home.

⁷⁴³ See Nick Wikeley *Co-ownership of property and entitlement to means-tested benefits* (2001) 8 J.S.S.L. 95 and Nick Wikeley *The valuation of co-owners’ interests in capital and means-tested benefits: half the value or the value of half?* in *New Perspectives on Property Law, Human Rights and the Home op. cit.*, ch. 7.

⁷⁴⁴ *Op. cit.*, para. 16.2.6.

⁷⁴⁵ See Law Com. No. 181 para. 3.3.

⁷⁴⁶ There is an extensive body of case-law in this area, *inter alia*, *Re Buchanan-Wollaston’s Conveyance*, *Jones v. Challenger*, *Rawlings v. Rawlings* [1964] P. 398, *Burke v. Burke* [1974] 1 W.L.R. 1063, *Williams v. Williams*, *Re Evers’ Trust* [1980] 1 W.L.R. 1327. For a discussion of this area, see Gray *Elements of Land Law* (2nd edn) *op. cit.*, p. 584-593.

development of judicial doctrine to the formulation of reasons why sale should not take place.⁷⁴⁷ When Lord Mackay, the Lord Advocate, introduced the Bill on its Second Reading in the House of Lords, he indicated that the old case law would apply.⁷⁴⁸

The Law Commission's view

It is unfortunate that the Law Commission does not present a clear, uniform and consistent approach to the status of the principles developed in the cases under the old section 30. On the one hand it appears that the Law Commission is advocating mere consolidation and rationalisation. The criteria in section 15 derive from the Law Commission's view that 'the court's discretion should be developed along the same lines as the current "primary purpose" doctrine. This approach was moulded to practical requirements and we consider that it gets the balance more or less right. Nevertheless we recommend that section 30 should set out some guidelines for the exercise of the court's discretion, the aim being to consolidate and rationalise the current approach. The criteria which the courts have evolved for settling disputes over trusts for sale are ones which will continue to have validity in the context of the new system.'⁷⁴⁹

On the other hand the Law Commission did lay the foundations for a completely new approach. The Law Commission stated that the inclusion of a power to sell or retain the land 'provides a foundation for restructuring of the jurisdiction of the court under section 30'.⁷⁵⁰ It also stated in relation to section 30 that, 'a restructuring of the trust powers should clear the way for a genuinely broad and flexible approach.'⁷⁵¹ This left the way open for courts to reassess the way that cases should be dealt with under section 15.

⁷⁴⁷ See Law Com. No. 181 para. 3.6.

⁷⁴⁸ H.L. Debs., Vol. 569, col. 1719. See Barraclough and Matthews *op. cit.*, para. 9.3.

⁷⁴⁹ Law Com. No. 181 para. 12.9. Footnote 141 states that, 'It is envisaged that there will be much value in the existing body of case law, even though these cases assume that there is a duty to sell.'

⁷⁵⁰ Law Com. No. 181 para. 10.6.

⁷⁵¹ Law Com. No. 181 para. 12.5.

Some general judicial pronouncements

Neuberger J. in *Mortgage Corporation Ltd v. Shaire* boldly stated that, 's 15 has changed the law'.⁷⁵² This is to be contrasted with the view of Cazalet J. in *A v. B*⁷⁵³ who adopted a traditional approach by stating, 'It appears that the section constitutes a consolidation and rationalization of the law as developed under s.30 of the Law of Property Act 1925. I consider that effectively established case law is given statutory force and is not made redundant.' A similar approach was adopted by Robert Walker L.J. in the Court of Appeal in *Wright v. Johnson*⁷⁵⁴ when he stated, 'That section'⁷⁵⁵ has now been replaced by s 14 of the Trusts of Land and Appointment of Trustees Act 1996, but nothing material turns on the statutory provisions.' In *H.M. Customs and Excise Commissioners v. A; A v. A*⁷⁵⁶ Munby J. stated that, 'Section 15 may have given the court a somewhat greater flexibility except where the application is made by a trustee in bankruptcy but the Court of Appeal's subsequent decision in *Bank of Ireland Home Mortgages Ltd v. Bell* [2001] 3 FCR 134 shows that it has hardly revolutionised things.'

Section 15 analysed

The list of factors set out in section 15(1) is not exhaustive and merely includes the factors set out in (a) to (d), which means that other matters may also be relevant.⁷⁵⁷ Since no factor is given any priority or weighting, the court has great discretion⁷⁵⁸ and the result of an application under section 15 cannot necessarily be predicted. Since the section says that the court *is* to have regard to the listed matters, not *may* have regard,

⁷⁵² *Op. cit.*, at 988.

⁷⁵³ *Op. cit.*, p. 8.

⁷⁵⁴ Unreported, 2 November 1999, LexisNexis p. 1-2, a case concerning disputed beneficial ownership in which the Court of Appeal adjourned the appeal due to insufficient documentary evidence.

⁷⁵⁵ Referring to section 30 of the Law of Property Act 1925.

⁷⁵⁶ [2002] E.W.H.C. 611, [2002] 2 F.L.R. 274 para. 115. Confirmed on appeal [2002] E.W.C.A. Civ. 1039, [2003] 2 W.L.R. 210. It was held that the court's jurisdiction to make a property adjustment order under section 24 of the Matrimonial Causes Act 1973 was not ousted when the property was the subject of an application to enforce a confiscation order under section 2 of the Drug Trafficking Act 1994.

⁷⁵⁷ *Bank of Ireland Home Mortgages Ltd v. Bell* [2001] 2 F.L.R. 809 para. 24.

⁷⁵⁸ The evaluation of McGonigal J. in *Chan Pui Chun v. Leung Kam Ho* [2002] B.P.I.R. 723 at 759-761 of the matters which he took into account under section 15, part of which is quoted in the Court of Appeal [2002] E.W.C.A. Civ. 1075, [2003] 1 F.L.R. 23 para. 47, is a good example of the weighing up of the different factors to arrive at the conclusion that the order for sale should be postponed until the time specified in the judgment, which was when Miss Chan had completed her current course of studies. This was not one of the grounds of appeal to the Court of Appeal.

the court's discretion would appear to be curtailed, at least in so far as they cannot ignore the listed factors.⁷⁵⁹

(a) 'the intentions of the person or persons (if any) who created the trust'

Section 15(1)(a) comprises 'the intentions of the person or persons (if any) who created the trust' which constitutes the settlor's intentions, usually under an express trust, and provides a statutory equivalent to the approach in *Re Buchanan-Wollaston's Conveyance*.⁷⁶⁰ This factor is primarily relevant to trusts created by express disposition or by will, particularly where the trust takes the form of a trust for sale.⁷⁶¹

In *Swain v. Foster*⁷⁶² Holman J. in the Court of Appeal (sitting with Swinton Thomas L.J.), dealing with an application for leave to appeal, approved the county court judge's decision in ordering sale based on the intention of the deceased that on the death of the widow the house should be sold. Holman J., however, was keen to stress that, 'I do not accept that the judge especially placed his findings as to intention "at the forefront of the decision-making process". It is true that he considered them first, no doubt because they appear as paragraphs (a) and (b) under section 15(1). But neither section 15(1) nor the judge himself accord any primacy to intention. It is but one of several matters in the sub-section and was but one of numerous factors taken into account by the judge.'⁷⁶³

⁷⁵⁹ See Michael Draper *Trusts of Land and Appointment of Trustees Act 1996: section 14* (1998) 142 S.J. 1076 and Michael Draper *Reformation or Revolution?* *op. cit.*, at p. 118.

⁷⁶⁰ The Court of Appeal held that a sale would not be ordered, since the parties had entered into a contract agreeing not to sell the land. Nigel P. Gravells *Co-ownership, Severance and Purchasers- The Law of Property (Joint Tenants) Act 1964 on Trial?* [2000] Conv. 461 at 473 especially footnote 33 states that both factors (a) and (b) of section 15(1) reflect the law developed by the courts before the 1996 Act, such as in *Jones v. Challenger* where the court ordered sale after the marriage had broken down. Smith *Property Law op. cit.*, p. 321 states that paragraphs (b) and probably (a) largely represent the law as developed by the courts prior to the 1996 Act. See also Thompson *Modern Land Law op. cit.*, p. 306-307.

⁷⁶¹ See Gray and Gray *op. cit.*, p. 923-924. In *Barclay v. Barclay*, for example, the Court of Appeal upheld the intention of the settlor as expressed in the will in ordering sale.

⁷⁶² Unreported, 14 October 1998, LexisNexis p. 3.

⁷⁶³ In *Hart v. Maddison* Unreported, 8 June 2001, LexisNexis p. 1-2, counsel for the applicant argued that Moseley J. did not take into account sufficiently the evidence in support of section 15(1)(a), but Thorpe L.J. in the Court of Appeal, in refusing to interfere with the judge's decision to order sale, held that the judge had carried out a balance to arrive at what was fair between the elderly couple.

(b) 'the purposes for which the property subject to the trust is held'

Section 15(1)(b) directs the court to have regard to 'the purposes for which the property subject to the trust is held'. This incorporates the collateral purpose doctrine,⁷⁶⁴ the underlying essence of which has now been made statutory. The inclusion of section 15(1)(b) emphasises the importance of indicating any underlying intention or purpose when an express trust is created.⁷⁶⁵ The element of purpose, if initially shared by all parties concerned, often operates almost by way of estoppel in pointing either towards sale or towards retention of the trust land.⁷⁶⁶

The wording of section 15(1)(b) is arguably ambiguous and potentially problematic: does it refer to the current purposes under which land is held or the purposes for which it was originally acquired?⁷⁶⁷ It is arguable that the court would look at *all* the purposes, despite the wording 'is', due to 'purposes' being in the plural, but would give greater weight to the current purpose.⁷⁶⁸ The view that the use of the present tense 'is held' excludes a purpose which is no longer applicable is supported by Peter Gibson L.J. in *Rodway v. Landy*,⁷⁶⁹ who stated that, '..... sub-paragraph (b), ... requires the examination of the purposes for which the trust property "is held". I emphasise the present tense, which shows that the relevant purposes are those subsisting at the time the court is determining the application.' This was also the approach adopted by Jarvis Q.C, sitting as a Deputy High Court Judge, in *Grindal v.*

⁷⁶⁴ See Devlin L.J. in *Jones v. Challenger op. cit.*, at 181 who explained that the duty to sell will not prevail where there was a secondary or collateral object besides that of sale.

⁷⁶⁵ This was stressed by Wroath J. in *T.S.B. Bank plc v. Marshall* [1998] 2 F.L.R. 769 at 773 who was adamant that there was not a collateral purpose to provide a home for the children once they were adult. His view was that such a purpose would have to be expressed in clear terms and the fact that two of the children were living at home and the youngest one, who was 18, was in full-time vocational training, did not mean that the collateral purpose was still subsisting.

⁷⁶⁶ See Gray and Gray *op. cit.*, p. 924 citing *Jones (AE) v. Jones (FW) op. cit.*, at 442, 443 as an example of an explicit use of estoppel terminology and Smith *Property Law op. cit.*, p. 323-324. See also *Re Buchanan-Wollaston's Conveyance* which is a manifestation of the principle of proprietary estoppel as is *Chan Pui Chun v. Leung Kam Ho*.

⁷⁶⁷ See Sydenham *Trusts of Land- the New Law: Trusts of Land and Appointment of Trustees Act 1996 op. cit.*, p. 95 whose view is that it refers to the current purpose under which the land is held. Harwood *op. cit.*, p. 184 states that, 'In any case, and significantly, s 15 breaks from the judicial philosophy applied to s 30. The court is clearly not limited to peering into the, possibly dark, glass of the original settlor's mind. It is pointed to form its own view of the current situation

⁷⁶⁸ In *Luciv v. Filinov* Unreported, 15 May 1980, LexisNexis p. 3-4 Megaw L.J., in delivering the judgment of the court, recognised that the underlying purpose could be superseded by other factors and as long as the underlying purpose was taken into account, subsequent factors may be relevant.

⁷⁶⁹ *Op. cit.*, at para. 26.

*Hooper*⁷⁷⁰ who, in ordering a sale of the property, rejected what appeared to be a cynical attempt to revive the original purpose or to claim a previously unarticulated purpose.⁷⁷¹ The provision of a home for the first defendant had long ceased to be a purpose for which the property was held.

Gravells argues⁷⁷² that the wording of other provisions in the Act seems to point to the view that the identification of the purpose for which the property is held should be determined at the time when the court is called upon to determine the application for an order for sale. Gravells proceeds to refer to one provision only, section 12(1), with its specific reference to ‘at that time’, but it is difficult to see how section 12(1) can have a bearing on the interpretation of section 15(1)(b) and in fact, it can be argued to the contrary, that the fact that section 15(1)(b) omits the words ‘at that time’ may indicate that both current and past factors are to be taken into account.

Clarke criticises⁷⁷³ the narrow approach to purpose adopted in *Bell* where Peter Gibson L.J. stated that the purpose of providing a family home ‘ceased to be operative once Mr Bell left the property.’⁷⁷⁴ Clarke notes that the court did not have the advantage of citation on the point, which would suggest that a purpose, especially where there is a child involved, may continue after the departure of one of the original couple who bought the property.⁷⁷⁵ Probert argues that the idea that the departure of one of the adult parties brings the purpose of providing a family home to an end is a contentious one, because where children are involved, it has been suggested that the purpose of providing a family home subsists beyond the departure of one of the adult members of the family.⁷⁷⁶ In *Chan Pui Chun v. Leung Kam Ho*⁷⁷⁷ McGonigal J. held

⁷⁷⁰ [1999] E.G.C.S. 150, 1999 WL 33105549.

⁷⁷¹ See Gravells *op. cit.*, p. 472-473.

⁷⁷² *Op. cit.*, p. 473 and footnote 34.

⁷⁷³ P.J. Clarke *Land Law and Trusts* [2001] All E.R.Rev. para. 17.1 at para. 17.31.

⁷⁷⁴ *Bank of Ireland Home Mortgages v. Bell op. cit.*, para. 28 approved in *First National Bank plc v. Achampong* [2003] E.W.C.A Civ. 487, [2003] 2 P. & C.R. D11, 2003 WL 1610228 paras. 61 and 65.

⁷⁷⁵ P.J. Clarke *op. cit.*, para. 17.31 noted that the court did not consider cases under section 30 of the Law of Property Act 1925 such as *Bedson v. Bedson*, *Williams v. Williams*, *Re Evers' Trust* and *Dennis v. McDonald*.

⁷⁷⁶ Rebecca Probert *Creditors and section 15 of the Trusts of Land and Appointment of Trustees Act 1996: first among equals?* [2002] Conv. 61 at 64 citing *Rawlings v. Rawlings*, *Re Evers' Trust*, *Dennis v. McDonald*, though there are two earlier authorities to the contrary: *Rivett v. Rivett* [1966] E.G.D. 706 and *Burke v. Burke*.

that the purpose of the trust included a purpose of providing a home for Miss Chan until the completion of her studies even when the relationship had ended. Whether the purpose survives the death of one of the parties will depend on the facts of each case.⁷⁷⁸

Probert argues that Peter Gibson L.J.'s statement in *Bell* concerning section 15(1)(b) 'could be taken as indicating that if the original purpose has come to an end, no other purposes may be taken into account. This negates Pascoe's suggestion that supervening purposes may be taken into account and elides the two paragraphs.'⁷⁷⁹ Although Probert is correct that the interpretation adopted by the Court of Appeal of section 15(1)(b) in *Bell* was restrictive,⁷⁸⁰ Peter Gibson L.J.'s statement is not authority for the proposition that supervening purposes will not be taken into account and it does not axiomatically restrict the extent to which supervening purposes may be taken into account. As Probert herself admits,⁷⁸¹ it is possible that the court in *Bell* was influenced by the fact that the son was almost 18 at the time of the trial and consistent with earlier authorities that the purpose of providing a family home should come to an end upon his attaining that age.

⁷⁷⁷ *Op. cit.*, p. 760. The Court of Appeal did not comment on this aspect of the decision. Probert states in *Family law and property law: competing spheres in the regulation of the family home op. cit.*, p. 46 that the agreement between the parties, that the property would not be sold unless both of them agreed, was more akin to the express agreement in *Re Buchanan-Wollaston's Conveyance* than the implied collateral purpose of providing a matrimonial home that was held not to survive the breakdown of the relationship in *Jones v. Challenger* and subsequent cases.

⁷⁷⁸ *Jones v. Challenger* supports the idea that the purpose has come to an end. The Court of Appeal in *Stott v. Ratcliffe* permitted the survivor to continue to occupy. This can only be reconciled with *Re Citro* if the purpose was also to provide a home for the survivor. In *Shaire* the house was larger than Mrs Shaire required and Neuberger J. was dubious whether the family home purpose survived death: see Smith *Property Law op. cit.*, p. 330. Counsel for the respondent argued in *Laird v. Laird op. cit.*, at 796 that, contrary to the view of the district judge, even if it is established that the purpose of the trust is at an end, the court must exercise a discretion as to what order is appropriate in that circumstance. Thorpe L.J. at 797 stated that, 'it is hard to resist Miss Langridge's submission that the district judge was wrong to have concluded that she had nothing to consider once she accepted that the purpose of the trust was at an end. But in the circumstances it does not seem to me that that consideration is of much relevance'. This demonstrates the court's attitude to retaining the ability to exercise flexibility in cases of death of one of the parties.

⁷⁷⁹ *Creditors and section 15 of the Trusts of Land and Appointment of Trustees Act 1996: first among equals? op. cit.*, p. 65 referring to Susan Pascoe *Section 15 of the Trusts of Land and Appointment of Trustees Act 1996- A Change in the Law?* [2000] Conv. 315 at 317-318.

⁷⁸⁰ See Probert *Creditors and section 15 of the Trusts of Land and Appointment of Trustees Act 1996: first among equals? op. cit.*, p. 64.

⁷⁸¹ *Ibid.*, p. 65.

There appears to be confusion exhibited by Peter Gibson L.J. in *Bell*⁷⁸² and Blackburne J. in *Achampong*⁷⁸³ in the overlap between section 15(1)(a) and (b) and in the terminology of section 15(1)(a) and (b) by intermingling the terms ‘intentions’ and ‘purposes’. In referring to section 15(1)(a) Peter Gibson L.J. stated, ‘Let me assume that the judge thereby had regard to s 15(1)(a), the intentions of the persons creating the trust. But that *purpose*⁷⁸⁴ ceased to be operative once Mr Bell left the family, either in 1991 or at any rate by 1992 when possession proceedings started. Mrs Bell is now divorced from Mr Bell. Therefore that *purpose*⁷⁸⁵ is not a matter to which the judge could properly have regard.’⁷⁸⁶ Peter Gibson L.J. is misguided to refer to purpose in discussing section 15(1)(a) and is confusing the guidelines. Peter Gibson L.J. then proceeded to apply the same test to section 15(1)(b) with no apparent distinction between section 15(1)(a) and (b). He stated, ‘But that is not an operative purpose of the trust since the departure of Mr Bell.’⁷⁸⁷ It would present a more coherent approach if fluidity had been maintained by using the terminology ‘intentions’ in discussing section 15(1)(a).

Superficially (a) and (b) may appear the same, because initially the settlor’s intention and purpose coincide. Yet purpose is inevitably far wider, since purpose is an evolving concept which may change with the passage of time.⁷⁸⁸ It is noteworthy that in the later case of *Rodway v. Landy*⁷⁸⁹ Peter Gibson L.J. warned against ‘conflating paragraphs (a) and (b) of section 15(1)’ and distinguished clearly between the intentions under section 15(1)(a) to practice from the property in partnership and the purposes under section 15(1)(b), which by the time the court was considering whether to make an order, did not include practising in partnership, since the partnership was

⁷⁸² *Op. cit.*, para. 27.

⁷⁸³ *Op. cit.*, para. 65 where Blackburne J. stated that, ‘Insofar as the purpose of the trust- and the intention of the Achampongs in creating it- was to provide a family home,’

⁷⁸⁴ Emphasis added.

⁷⁸⁵ Emphasis added.

⁷⁸⁶ *Op. cit.*, para. 27.

⁷⁸⁷ *Op. cit.*, para. 28.

⁷⁸⁸ Hudson *op. cit.*, para. 16.2.4 states that purpose may be flexible, since (b) refers to the purposes for which the property is being held at any time which might then be different to the underlying purposes set out in paragraph (a).

⁷⁸⁹ Judgment in *Rodway v. Landy* was delivered on 4 April 2001 whereas judgment in *Bell* was delivered on 4 December 2000.

at an end.⁷⁹⁰ As Thompson stated, paragraph (b) must refer to any change from the original purpose, which in *Achampong* should presumably have meant that the interests of the other occupiers of the property ought to have been a factor to have been given consideration.⁷⁹¹

(c) 'the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home'

Section 15(1)(c) directs the court to have regard to 'the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home'. This was a factor which the Law Commission wanted as a separate guideline: 'Our recommendation here is that the welfare of the children should be expressly defined as an independent consideration. The aim is to ensure that the interests of children are not linked to the interests of particular beneficial owners.'⁷⁹² Since the 1996 Act has enhanced the status of this consideration, it is to be taken fully into account in every case, whether or not the purpose of the trust was to provide a family home, thereby changing the law.⁷⁹³

In Tee's view the 1996 Act went even further than reinforcing the statutory recognition of present-day realities when confirming that a beneficiary under a trust of land is entitled to occupy that land, in recognising the contemporary family context by enabling a court to take into account, when making an order concerning the trust under section 14, the welfare of any child living in the home.⁷⁹⁴ Her opinion is that this acknowledgement that a non-property consideration is relevant is a departure

⁷⁹⁰ *Op. cit.*, para. 26.

⁷⁹¹ M.P. Thompson *Undue Influence before Etridge* [2003] Conv. 314 at 323 where Thompson regrets that Blackburne J. in *Achampong op. cit.*, para. 65 accepted that their interests were relevant but, without giving any reasons said simply that, 'I am unpersuaded that it is a consideration to which much if any weight should be attached.'

⁷⁹² Law Com. No. 181 para. 12.9. Prior to 1997, the position was not always clear what weight was to be given to the relevance of children, though generally a sale would not be ordered until the home was no longer required for the children: *Williams v. Williams, Re Evers' Trust, Rawlings v. Rawlings*. However, in other cases, children's interests were only taken into account as a factor incidentally so far as it affected the equities in the matter: *Burke v. Burke, Re Bailey* [1977] 1 W.L.R. 278. For more detail, see Gray *Elements of Land Law* (2nd edn) *op. cit.*, p. 588-592, Thompson *Modern Land Law op. cit.*, p. 308, M.P. Thompson *Cohabitation, Co-ownership and Section 30* [1984] Conv. 103 at 104-109 and Rhona Schuz *Section 30 Law of Property Act 1925 and Unmarried Cohabitees* [1982] Fam. Law 108 at 108-112 and 115.

⁷⁹³ See Lewin on Trusts *op. cit.*, para. 37-64.

⁷⁹⁴ Louise Tee *Co-ownership and trusts in Land Law Issues, Debates, Policy* edited by Louise Tee (2002) ch. 5 at p. 148-149.

from conventional orthodoxy; but its impact should not be exaggerated- in practice judges had previously managed to take such matters into account by looking at the underlying purpose of the trust. Dewar states that particularly striking is the fact that children will rarely be owners of any interest in the home in question, so this section represents the explicit intrusion of welfarist considerations into deliberations about property rights and their effects.⁷⁹⁵

Chappelle goes even further than this by stating that section 15(1)(c) seems to raise the child's occupation above a mere consideration: it seems to raise the child to the position of a quasi-beneficiary, although she does recognise that it is vital to understand that merely being a child of property-owning parents does not give any interest in that land.⁷⁹⁶ Hudson argues that section 15(1)(c) ought to lead to the importation of elements of child law and the Children Act 1989 into this area, whereby the welfare of the child is made paramount.⁷⁹⁷

In *Bell*⁷⁹⁸ Peter Gibson L.J. was right in his approach to the son who at the time of the trial was not far short of 18 and therefore should only have been a very slight consideration.⁷⁹⁹ In *Achampong* Blackburne J. recognised that, 'While it is relevant to consider the interests of the infant grandchildren in occupation of the property, it is difficult to attach much if any weight to their position in the absence of any evidence as to how their welfare may be adversely affected if an order for sale is now made.'⁸⁰⁰

⁷⁹⁵ Dewar *Land, Law, and the Family Home op. cit.*, p. 338.

⁷⁹⁶ See Diane Chappelle *Land Law* (6th edn 2004) p. 198.

⁷⁹⁷ *Op. cit.*, paras. 16.2.4 and 16.3.3. Where the property is jointly owned, Elizabeth Cooke in *Children and Real Property- Trusts, Interests and Considerations* [1998] Fam. Law 349 at 351 suggests that application for a property adjustment order for the benefit of a child where the parents are unmarried should be made both under the Children Act 1989 and under the 1996 Act. The considerations relevant in the two statutory regimes are different and the court should look at both sets. See also Mavis MacLean, John Eekelaar, Jane Lewis, Sue Arthur, Stephen Finch, Rory Fitzgerald and Philippa Pearson *When Cohabiting Parents Separate- Law and Expectations* [2002] Fam. Law 373.

⁷⁹⁸ *Op. cit.*, para. 28.

⁷⁹⁹ Probert *Creditors and section 15 of the Trusts of Land and Appointment of Trustees Act 1996: first among equals? op. cit.*, p. 65 argues that the implication that the interests of younger children are of key importance perhaps does not give sufficient weight to the importance of the exams sat at 16 and 18. The courts have not always been receptive to such issues as in *Re Bailey* where the son was 16 and still in full-time education and Megarry V.-C., in ordering sale of the home, held *op. cit.*, at 282 that, 'the evidence about the interference with his educational prospects is very slight'. Probert's view is that it would be unfortunate if the weight to be attached to the interests of a minor were to be graded according to age without the interests of the minor being considered in each case.

⁸⁰⁰ *Op. cit.*, para. 65.

Thompson postulates what further evidence would have made their welfare a live consideration, since the grandchildren would lose their home as a result of an order for sale.⁸⁰¹ Thompson regrets that it is unfortunate that continued occupation of the house by a person under a disability was not explored further, because in the past, the presence of handicapped children has been seen to be a relevant factor in deciding whether a house should be sold.⁸⁰² The Achampongs' elder daughter had a mental disability, but Blackburne J.'s judgment indicates that the mere presence of a disabled person or infant children is insufficient *ipso facto* to prevent or postpone a sale and that care needs to be taken to present evidence to the court of the impact of sale.

(d) 'the interests of any secured creditor of any beneficiary'

Section 15(1)(d) is worded widely to direct the court to have regard to 'the interests of any secured creditor of any beneficiary'. Prior to 1997, the interests of secured creditors were treated in the same way as a trustee in bankruptcy with the result that a sale would usually be ordered.⁸⁰³ The principle applied by the courts as exemplified in *Re Citro*⁸⁰⁴ was that, 'the voice of the creditors will usually prevail over the voice of the other spouse and a sale of the property ordered within a short period. The voice of the other spouse will only prevail in exceptional circumstances.'⁸⁰⁵ The principles governing sale on bankruptcy are now governed by sections 335A-337 of the Insolvency Act 1986 and section 15(4) of the 1996 Act states that section 15 'does not

⁸⁰¹ *Undue Influence before Etridge op. cit.*, p. 323.

⁸⁰² See Walton J. *obiter* in *Re Bailey op. cit.*, p. 284.

⁸⁰³ See *Lloyds Bank plc v. Byrne* [1993] 1 F.L.R. 369 at 375 where Parker L.J. giving judgment in the Court of Appeal held that, 'there is no difference in principle between the case of a trustee in bankruptcy and that of a chargee.' Laddie J. followed the decision in *Byrne* in *Barclays Bank plc v. Hendricks* [1996] 1 F.L.R. 258. See also N.S. Price *The Enforcement of Charging Orders over the Matrimonial Home* [1997] Conv. 464. A sale was not ordered in *Abbey National plc v. Moss* [1994] 1 F.L.R. 307 where the Court of Appeal by a majority (Peter Gibson and Ralph Gibson L.JJ. with Hirst L.J. dissenting) declined to make an order for sale, since the collateral purpose of occupation of one of the co-owners, the mother of the chargor, to remain in the property until her death, was still subsisting. Nicholas Hopkins *Creditors and Collateral Purposes* (1995) 111 L.Q.R. 111 is highly critical of the decision and of the majority judgment of Peter Gibson L.J. and argues that sale should have been ordered. See also Michael Harwood *Gathering Moss- Trusts for Sale* [1996] Fam. Law 293 and Harwood *A Home for Life- The New Trusts of Land Act op. cit.*

⁸⁰⁴ *Op. cit.*, at 157 per Nourse L.J. The Court of Appeal made an order for sale in favour of the trustee in bankruptcy under section 30 of the Law of Property Act 1925. The Court of Appeal was following the decision in *Re Solomon* [1967] Ch. 573 where Goff J. held at 588 that, 'In the circumstances the voice of the trustee in bankruptcy is one which ought to prevail'.

⁸⁰⁵ Exceptional circumstances were very hard to prove. A wife with young children faced with eviction, where she would not have enough money to buy a comparable home and where her children's schooling would be disrupted, did not constitute exceptional circumstances in *Re Citro*.

apply to an application if section 335A of the Insolvency Act 1986 applies to it.' One year after the bankruptcy the court shall assume that the interests of the bankrupt's creditors outweigh all other considerations unless the circumstances of the case are exceptional.⁸⁰⁶ In deciding what exceptional circumstances are, the courts have applied the law prior to the 1986 Act.⁸⁰⁷

The Law Commission stated that, '..... it may be that the courts' approach to creditors' interests will be altered by the framing of the guideline as to the welfare of children. If the welfare of children is seen as a factor to be considered independently of the beneficiaries' holdings, the courts may be less ready to order the sale of the home than they are at present.'⁸⁰⁸ This clearly represents a change in the law relieving the harshness of the previous law for families. By putting the interests of the secured creditor on a par with the other matters in section 15, it is clearly arguable that Parliament intended to reduce or nullify the precedence of creditors.⁸⁰⁹

Early case law in *T.S.B. Bank plc v. Marshall*⁸¹⁰ indicated that sale would be ordered except in exceptional circumstances and that the cases under the old section 30 apply to an application under section 14. Moreover, although *Bank of Baroda v. Dhillon*⁸¹¹ was a case on the old section 30, where the court ordered sale despite the existence of an overriding interest, there was no indication by the Court of Appeal that the decision would have been different under the 1996 Act.⁸¹² This should, however, be

⁸⁰⁶ Section 335A(3) of the Insolvency Act 1986.

⁸⁰⁷ See Nourse L.J. in *Re Citro op. cit.*, at 159. Exceptional circumstances were found in *Re Holliday* [1981] Ch. 405 where the court postponed sale for five years where the ex-husband was adjudicated bankrupt on his own petition. For a review of cases involving exceptional circumstances (especially those under section 335A(3) of the Insolvency Act 1986), including *Re Raval* [1998] 2 F.L.R. 718, *Re Ng* [1998] 2 F.L.R. 386, *Claughton v. Charalambous* [1999] 1 F.L.R. 740 and *Re Bremner* [1999] 1 F.L.R. 912, see Gareth Miller *Applications by a trustee in bankruptcy for sale of the family home* (1999) 15 I.L.P. 176.

⁸⁰⁸ Law Com. No. 181 para. 12.10 footnote 143.

⁸⁰⁹ See *Lewin on Trusts op. cit.*, para. 37-65.

⁸¹⁰ Wroath J. *op. cit.*, at 771-772 held that the principles established in *Lloyds Bank plc v. Byrne, Abbey National plc v. Moss* and *Barclays Bank plc v. Hendricks* were applicable to an application under section 14 and that where there is a conflict between a chargee's interest in a matrimonial home and the interests of an innocent spouse, the interest of the chargee will prevail except where there are exceptional circumstances. Wroath J.'s view was that the wife was not in any event an innocent spouse, since she created the charge to the bank with the first defendant.

⁸¹¹ [1998] 1 F.L.R. 524. The Court of Appeal held that the mortgagee could obtain an order for sale despite the wife's overriding interest.

⁸¹² See Susan Pascoe *The Further Decline of Overriding Interests: Bank of Baroda v. Dhillon* [1998] Conv. 415. See also Rosalyn Wells *Sale of the Matrimonial Home- Bank of Baroda v. Dhillon* [1998]

compared with the view expressed by Peter Gibson L.J. in *Banker's Trust Co. v. Namdar*.⁸¹³ Having come to the conclusion that the wife's appeal against an order for sale under section 30 had to be refused in light of the reasoning in *Citro* and *Byrne*, Peter Gibson L.J. stated that, 'It is unfortunate for Mrs Namdar that the very recent Trusts of Land and Appointment of Trustees Act was not in force at the relevant time as the result might have been different.'⁸¹⁴

(i) *A landmark approach in Shaire?*

It was not until *Mortgage Corporation Ltd v. Shaire* that the judiciary exhibited a clear shift in attitude demonstrating that priority was not automatically to be given to secured creditors. Neuberger J. gave eight reasons why section 15 has changed the law.⁸¹⁵ Two of these, his second and eighth reasons, are the most convincing. His second reason⁸¹⁶ is that Parliament could not have intended the old law to continue, because whilst the interest of a chargee is one of the four specified factors to be taken into account in section 15(1)(d), there is no suggestion that it is to be given any more importance than the interests of the children residing in the house.

Neuberger J.'s eighth reason is similarly compelling: the dissatisfaction with the existing law. '... it does not seem to me unlikely⁸¹⁷ that the legislature intended to relax the fetters on the way in which the court exercised its discretion in cases such as *Citro* and *Byrne*, and so as to tip the balance somewhat more in favour of families and against banks and other chargees.'⁸¹⁸ Neuberger J. cites indications of judicial dissatisfaction⁸¹⁹ with which he inevitably sympathises. Neuberger J. disagreed with

Fam. Law 208. *Dhillon* has recently been followed by Peter Smith J. in *Pritchard Englefield v. Steinberg* [2004] E.W.H.C. 1908, Lawtel 6 August 2004.

⁸¹³ [1997] E.G.C.S. 20. Peter Gibson L.J. held that the subsistence of the collateral purpose (a home for Mr and Mrs Namdar and their children) was brought to an end by the alienation by Mr Namdar of his interest in it by charging that interest to the bank and the children had no separate property right to occupy. It followed that there was no subsisting collateral purpose which overrode the basic purpose of the trust for sale.

⁸¹⁴ LexisNexis, p. 12.

⁸¹⁵ For a full analysis and critique of all eight reasons, see Pascoe *Section 15 of the Trusts of Land and Appointment of Trustees Act 1996- A Change in the Law?* *op. cit.*, p. 321-327.

⁸¹⁶ *Op. cit.*, p. 988.

⁸¹⁷ Note the double negative, indicating that Neuberger J. realises that he is treading on potentially contentious territory.

⁸¹⁸ *Op. cit.*, p. 990.

⁸¹⁹ Neuberger J. stated *op. cit.*, p. 990 that, 'Although Bingham L.J. agreed with Nourse L.J. in *Citro*, he expressed unhappiness with the result at p. 161F, and Sir George Waller's dissatisfaction went so far

Wroath J. in *T.S.B. Bank plc v. Marshall*⁸²⁰ which up until now had been accepted as a sound decision, on the basis that 'it does not appear to what extent the matter was argued before him.'⁸²¹

This left Neuberger J. with the tricky problem of how to treat the wealth of case law under section 30. He concluded that, 'I think it would be wrong to throw over all the earlier cases without paying them any regard. However they have to be treated with caution, in light of the change in the law, and in many cases they are unlikely to be of great, let alone decisive assistance.'⁸²² In the light of his bold stand, one would have expected him simply to refuse to order sale. Yet he would only refuse to order sale if the Mortgage Corporation had its equity converted into a loan and Mrs Shaire would pay interest on the loan.⁸²³ He stated realistically that, 'For TMC to be locked into a quarter of the equity in a property would be a significant disadvantage unless they had a proper return and a proper protection so far as insurance and repair is concerned.'⁸²⁴ He would not make an order without more information. The child in that case was over twenty years old, but Neuberger J. paved the way for a decision which refuses to order sale to a secured creditor based on the interests of children.

This solution was fair on the creditor in the *Shaire* case and if Mrs Shaire would not agree to this or could not afford the interest, then the house would have to be sold,

as led him to dissent: see his judgment at p. 161 to p. 163. Furthermore, there is a decision of the Court of Appeal in *Abbey National plc v. Moss* [1994] 1 F.L.R. 307, which suggests a desire for a new approach.'

⁸²⁰ Martin Dixon *Co-ownership and TLATA 1996* (1999) 27 S.L.R. 58 at 59 noted that the old pre-1997 presumption, that a sale should occur unless there is a collateral purpose, strictly is not applicable, but the judge appears to have thought that he should order a sale unless such a collateral purpose existed. Dixon comments that one of the purposes of the 1996 Act is to ensure that the courts have a freer hand to deny sale than was the case previously, and to do this, the court needs to develop a new rationale that does not hark back to the pre-1997 law and this case does not provide it.

⁸²¹ *Op. cit.*, p. 990. Wroath J. did not have to deal with the conflict between the second and third principles, because section 15(1)(c) specifically confines consideration of the welfare of any children to minors and the youngest child in that case was 18. Wroath J. could therefore avoid this complex problem.

⁸²² *Op. cit.*, p. 991.

⁸²³ John M. Samson *Joint Ownership- Forcing a Sale* (2001) 22 P.L.B. 25 at 31 states that the suggestion that the parties reach a compromise, with a particular proposed compromise in mind and the alternative of an order forcing the issue, sets a healthy precedent for the judicial process. A route whereby the court is able to bring the parties to adopt a compromise cannot but be applauded.

⁸²⁴ *Op. cit.*, p. 993-994.

even taking into account Mrs Shaire's majority beneficial interest.⁸²⁵ The case is important in accepting the proposition that, under the new Act, the interests of a secured creditor are no longer to be regarded as paramount in considering whether or not the property should be sold.⁸²⁶ The case appears to support the view that the courts have been equipped with a useful and more flexible tool to tailor outcomes to suit the particular facts of the case.⁸²⁷ In so doing, the case suggests a workable practical solution to the problems arising from the often simultaneous functions of family property as both a home and as an asset in commercial transactions.⁸²⁸

The application of the 1996 Act by Neuberger J., which dilutes the commercial bias of the law outside the bankruptcy setting, gives a welcome but necessarily imperfect glimpse of the practical reconciliation of the dual nature of family property.⁸²⁹ The decision in *Shaire* looked after the interests of both creditor and defendant, although it was viable only because of the size of the shares in the case and will not always be viable.⁸³⁰ Radley-Gardner rightly regards *Shaire* as an unusual case in which the court could afford to be generous, since Mrs Shaire was an unusual defendant, in that she was solvent and had the means to re-house herself.⁸³¹

⁸²⁵ Jeremy de Souza *The Valuation of Undivided Shares in English Land* [2002] P.C.B. 328 at 331 asserts that this solution was obviously fair and reasonable for that type of applicant, but if the minority holder had been a newly married child in need of access to cash to buy a home for his own family, this would clearly not have been the case. It remains to be seen how the courts will approach such circumstances.

⁸²⁶ M.P. Thompson *Secured Creditors and Sales* [2000] Conv. 329 at 336. P.J. Clarke *op. cit.*, para. 17.29 was unduly optimistic and generalised when he stated that, 'Therefore, there was a straight conflict between the interest of the wife and the interest of the creditor: and the wife "won"', but was correct in stating that, 'This is, of course, a result totally different from that which would have occurred under the previous law.' In Clarke's view, 'the most significant point is that spouses- and other co-occupiers- and, a fortiori, those with minor children living in the relevant property, are given greater protection.' Clarke does, however, recognise para. 17.30 that Neuberger J.'s generosity became more muted when applying his conclusions to the facts.

⁸²⁷ Roger Smithers *Trust or trussed?* (2002) 146 S.J. 1079 at 1080 commented that, 'The wife triumphed. Clearly, application of the old law would have led to the opposite result. The 1996 Act made a difference.'

⁸²⁸ See Oliver Radley-Gardner *Chargees and Family Property* [2001] 1 Web J.C.L.I. Radley-Gardner highlights p. 7 that the decision would nonetheless be viewed nervously by mortgagees, since commercial considerations must bow (albeit as slightly as possible) to the welfare of the parties.

⁸²⁹ *Ibid.*, p. 7. See also Mika Oldham *Balancing Commercial and Family Interests under TLATA 1996*, s. 15 [2001] C.L.J. 43 at 45 who welcomes the law's flexibility to broker a solution for the two parties. Oldham comments that the decision meets many of the judicial and academic criticisms levelled against the old section 30 and that it heralds a new flexibility of approach in which family and commercial interests can be balanced.

⁸³⁰ Smith *Property Law op. cit.*, p. 330.

⁸³¹ Oliver Radley-Gardner *Section 15 of TLATA, or, The Importance of Being Earners* [2003] 5 Web J.C.L.I. at 2-3.

One potential difficulty with the decision in *Shaire* is that lending institutions may now prefer to bring their application in the context of bankruptcy proceedings.⁸³² Secured creditors may initiate bankruptcy proceedings when the time is right to ensure an almost certain sale, instead of taking their chances under a section 14 application with its concern for the welfare of parties whom it is practically possible to protect. This may be regrettable, since it undermines the protection which the 1996 Act provides.⁸³³ Although this appears to be getting in by the back door since the mortgagee could not themselves get a sale under section 14, it is not an abuse of the process and will not be prevented by the court as was made clear by Peter Gibson L.J. in *Alliance and Leicester plc v. Slayford*.⁸³⁴ The decision demonstrates that the protection given to innocent wives by *Boland* and *Barclays Bank plc v. O'Brien*⁸³⁵ may be deceptive, but it is a welcome judgment reflecting the fact that mortgagee's remedies are cumulative and provides mortgagees who find themselves on the wrong end of either a *Boland* or an *O'Brien* defence with ways in which to recover some, if not all, of the money which they have lent.⁸³⁶ It means that even if a more flexible approach has emerged under section 15, it may well be illusory, since it would easily be undercut by recourse to the insolvency regime.⁸³⁷

⁸³² The view of Tee *Co-ownership and trusts* in *Land Law Issues, Debates and Policy op. cit.*, p. 152 is that this is not to say that the 1996 Act has dramatically altered the balance of advantage, because even where a creditor is refused sale, if it institutes bankruptcy proceedings against the debtor and is successful, it can then take advantage of section 335A(3) of the Insolvency Act 1986, which in effect allows a sale a year after a bankruptcy order is made. This is, however, a far more cumbersome, lengthy and expensive procedure.

⁸³³ See Radley-Gardner *Chargées and Family Property op. cit.*, p. 7.

⁸³⁴ [2001] 1 All E.R. (Comm.) 1 paras. 28 and 30-31. The court followed the decision of Jonathan Parker J. in *Zandfarid v. B.C.C.I. International S.A.* [1996] 1 W.L.R. 1420. Mrs Slayford was an epileptic and it is impossible to know what effect her illness would have on a court's decision when faced with a petition for sale brought by the trustee in bankruptcy. The health of a bankrupt's spouse can, if sufficiently serious, be regarded as an exceptional circumstance inclining a court to refuse an immediate sale: see *Re Raval* [1998] 2 F.L.R. 718 (paranoid schizophrenia) and *Claughton v. Charalambous* [1999] 1 F.L.R. 740 (renal failure and arthritis). It might be that ultimately a sale could be postponed beyond the year from the bankruptcy envisaged by the Insolvency Act. See M.P. Thompson *The Cumulative Range of a Mortgagee's Remedies* [2002] Conv. 53 at 60.

⁸³⁵ [1994] 1 A.C. 180.

⁸³⁶ Thompson *The Cumulative Range of a Mortgagee's Remedies op. cit.*, p. 60-61. See also Mark Pawlowski and Sarah Greer *Undue Influence- Back Door Tactics* [2001] Fam. Law 275 at 279 where they conclude that it remains to be seen to what extent lending institutions adopt the practice of suing the husband debtor upon his personal covenant with a view to forcing a sale of the matrimonial home, notwithstanding the wife's equity arising from a successful *O'Brien* defence. Oldham *Balancing Commercial and Family Interests under TLATA 1996 op. cit.*, p. 45 comments that such actions are likely to increase and since mortgagees enjoy cumulative remedies, restrictions imposed on one remedy will no doubt impact on their recourse to others.

⁸³⁷ See Radley-Gardner *Section 15 of TLATA, or, The Importance of Being Earners op. cit.*, p. 3.

(ii) *Retreat from Shaire to prioritise creditors?*

An arrangement such as that adopted in *Shaire* was not viable in *Bank of Ireland Home Mortgages Ltd v. Bell*. The Court of Appeal ordered sale in *Bell* where the mortgage debt of £300,000 at the time of the trial exceeded the value of the entire property, no payment of capital or interest had been made since 1992, Mrs Bell's beneficial interest was only about 10 per cent at the most, there was no equity in the property which would be realised for her on a sale of the property and the son at the time of the trial was not far short of 18. Peter Gibson L.J. stated that, 'The 1996 Act appears to have given scope for some change in the court's practice.'⁸³⁸ Nevertheless, a powerful consideration is and ought to be whether the creditor is receiving proper recompense for being kept out of his money, repayment of which is overdue (see *Mortgage Corporation plc v. Shaire*).⁸³⁹ Peter Gibson L.J. has retreated from the flexible approach he indicated might be forthcoming in *Namdar*.⁸⁴⁰

It is odd that Peter Gibson L.J. utilised *Shaire* to support his proposition, since Peter Gibson L.J. looks at the actual decision reached in *Shaire* rather than the analysis of Neuberger J. in that case. This represents a retreat from the reasoning of Neuberger J. in *Shaire*. Sir Christopher Staughton's reasoning pursues the traditional orthodoxy when he stated, 'Unless there is a sale in the foreseeable future, the bank will get no return for its money, and no repayment of principal, until such time as Mrs Bell wishes to leave the house or is compelled to do so. That would not be justice in this case. The bank is a beneficiary of the trust referred to in s 15 as much as Mrs Bell.'⁸⁴¹ Sir Christopher Staughton's odd and loose use of terminology in referring to the bank as a beneficiary of the trust is misguided in this context.

⁸³⁸ Peter Gibson L.J. had previously referred to the position prior to the 1996 Act where the courts would order sale at the request of the trustee in bankruptcy of a spouse or of the creditor chargee of a spouse, considering that the creditors' interests should prevail over that of the other spouse and the spouse's family save in exceptional circumstances.

⁸³⁹ *Op. cit.*, para. 31.

⁸⁴⁰ *Op. cit.*, LexisNexis p. 12. His judgment in *Bell* reflects the restrictive approach under section 30 to which he himself did not fully ascribe when it was still in force in *Abbey National plc v. Moss op. cit.*, at 317-318: see Radley-Gardner *Section 15 of TLATA, or, The Importance of Being Earners op. cit.*, p. 3.

⁸⁴¹ *Op. cit.*, p. 817.

Dixon is concerned about the court's emphasis on the need to allow a creditor its money and hopes that this case is limited to its own facts rather than being taken as evidence of a 'silent presumption' that sale should be ordered in such cases.⁸⁴² However, in *H.M. Customs and Excise Commissioners v. A; A v. A* Munby J. stated that, 'it seems to me that the *Bank of Ireland* case marks the limits beyond which the court cannot properly go.'⁸⁴³ Probert's analysis identifies three ways in which the interests of creditors may prevail over the interests of those opposing sale⁸⁴⁴ and argues that *Bell* drew on all three approaches to make the point that the Court of Appeal were keen to limit the effect of *Shaire*.⁸⁴⁵ Probert is right in stating that emphasising that importance is to be attached to one factor is arguably inconsistent with the idea of parity between the factors listed.⁸⁴⁶ The decision was the right one on the facts but the danger in the reasoning lies in the way that it downgrades the purpose of providing a family home as against the interests of the creditors.⁸⁴⁷ Probert identifies 'the risk that the interests of creditors will trump the rights of even very young children If this interpretation of section 15 prevails then the wind has changed and blown us back to where we started.'⁸⁴⁸

⁸⁴² Martin Dixon *Trusts of land, sale and TOLATA: disputes between co-owners and third parties* (2001) 32 S.L.R. 59 states that whereas it was clear in *Shaire* that the 1996 Act had effected a sea change in the law by making a sale of land less likely, even at the behest of a bank with an equitable charge over one co-owner's share, in *Bell* the Court of Appeal reverts to type and finds every reason to favour a sale. Dixon stresses that it is important to avoid confusion between applications for sale made by creditors with 'merely' equitable charges over one co-owner's interest and applications by the trustee in bankruptcy.

⁸⁴³ *Op. cit.*, para. 127. Munby J. was referring to the fact that as a joint owner of the house, the wife was entitled to the full protection, not only of section 31(4) of the Drug Trafficking Act 1994 (since repealed by the Proceeds of Crime Act 2002 Sch. 12 para. 1), which safeguarded her right to continue to enjoy the property, because she was totally innocent of any wrongdoing, but also to the protection of section 15 of the 1996 Act.

⁸⁴⁴ *Creditors and section 15 of the Trusts of Land and Appointment of Trustees Act 1996: first among equals?* *op. cit.*, p. 62-63. First, the courts may privilege the interests of creditors above the other factors listed in section 15; secondly, the courts may restrict the scope of the other factors listed in section 15 without overtly declaring that the interests of creditors are more important; thirdly, on the facts of the case the interests of the creditors may prevail once all the relevant factors have been balanced against one another.

⁸⁴⁵ Probert *ibid.*, p. 63, stresses that *Shaire* did not lay down any rule that sale should only be refused if the owner-occupier was able to demonstrate his or her ability to repay. It was merely appropriate in that case once the equally weighted factors listed in section 15 had been balanced against one another.

⁸⁴⁶ *Ibid.*, p. 63.

⁸⁴⁷ Smithers *op. cit.*, p. 1080 is right that although the tone in *Bell* is less charitable than that adopted by Neuberger J. in *Shaire*, on the facts *Bell* must be correct, because not to have ordered sale would have been not to have accorded any weight to the bank's interests.

⁸⁴⁸ *Creditors and section 15 of the Trusts of Land and Appointment of Trustees Act 1996: first among equals?* *op. cit.*, p. 66-67. Rebecca Bailey-Harris *Case Reports* [2001] Fam. Law 805 at 806 comments that it seems likely that cases where sale is refused rather than postponed will continue to be extremely rare. How much scope there is for a change in practice remains to be explored in future case law where

Bell was explicitly approved in *First National Bank plc v. Achampong*⁸⁴⁹ where Blackburne J. sitting in the Court of Appeal stated that, 'I regard it as plain that an order for sale should be made. Prominent among the considerations which lead to that conclusion is that, unless an order for sale is made, the bank will be kept waiting indefinitely for any payment out of what is, for all practical purposes, its own share of the property.'⁸⁵⁰ Thompson comments that it is becoming apparent that the interest of the secured creditor is likely to be given priority over the other considerations listed in section 15, unless the occupier of the property is able, as was the case in *Shaire*, to come up with a plan which will safeguard the financial interests of the creditor.⁸⁵¹ Thompson highlights the irony that Mrs Achampong may have been given more time to come to terms with the necessity of the house being sold if her husband had been made bankrupt⁸⁵² than, as was actually the case, he had not.⁸⁵³ He is right that when a secured creditor is petitioning for a sale of the family home, the court should give serious consideration to postponing the sale for a year, thereby arriving at a position consistent with that which occurs in bankruptcy.

Radley-Gardner highlights the steady resettling of the balance in favour of institutional lenders which continued in *Achampong* and comments⁸⁵⁴ that the judgment of Blackburne J. is reminiscent of the *dictum* of Nourse L.J. in *Re Citro*⁸⁵⁵ that a wife with young children being faced with eviction, change of neighbourhood and schools 'cannot be described as exceptional. They are the melancholy consequences of debt and improvidence with which every civilised society has been familiar.' It may be that the spectre of exceptional circumstances is still haunting co-owners' disputes with secured creditors. Without buying out the secured creditor, the remaining co-owner is unlikely to be able to prevent a sale.

the contrast between the interests of the family and those of the creditor is less marked than in *Bell*, for example where the debt is smaller, the children younger and the marriage still a going concern.

⁸⁴⁹ *Op. cit.*, paras. 61-62.

⁸⁵⁰ *Op. cit.*, para. 65. Blackburne J. would not accept para. 62 that Mrs Achampong could complain about the delay of the bank in bringing proceedings, since 'she has had the use of the whole property in the meantime.' Peter Gibson L.J. also expressed such views in *Bell* para. 32.

⁸⁵¹ *Undue Influence before Etridge op. cit.*, p. 322.

⁸⁵² This is due to the fact that during the year following the bankruptcy, the interests of the bankrupt's creditors are not afforded higher priority than the other considerations under section 335A of the Insolvency Act 1986.

⁸⁵³ *Op. cit.*, p. 325.

⁸⁵⁴ *Section 15 of TLATA, or, The Importance of Being Earners op. cit.*, p. 5.

⁸⁵⁵ *Op. cit.*, at 157.

Radley-Gardner argues that any perceived injustice lies not in section 15, but with the underlying law of insolvency, since if section 15 goes further than section 335A in protecting co-owners, secured creditors will simply use the insolvency route to bypass section 15, rendering it otiose.⁸⁵⁶ This raises the issue of whether the Insolvency Act 1986 needs to be amended to be less creditor-friendly, whether one should introduce homestead legislation in this country or whether the remedies of a mortgagee should cease to be cumulative so that personal claims must be exhausted first. His view is that the declaration that ‘greater flexibility’ exists under section 15 has proven too optimistic a prognosis. He suggests re-drafting section 15 in such a way to give less false hope to defending co-owners.

Further emphasis was placed on the supremacy of creditors in *Pritchard Englefield v. Steinberg*⁸⁵⁷ where Peter Smith J., in ordering a sale of the property, held that Mrs Steinberg’s overriding interest under section 70(1)(g) of the Land Registration Act 1925 was prior to the interest of the bank, but should not be paramount, since that would frustrate the claimants’ legitimate desire to realise their charge. Peter Smith J. stated that, ‘Under the 1996 Act the court has considerable powers in respect of trusts (sections 14 and 15 and *Bank of Baroda v. Dhillon* [1998] F.L.R. 324 and *Mortgage Corporation v. Shaire* [2001] Ch. 743).’ Despite following *Dhillon*, Peter Smith J. did grant Mrs Steinberg a short opportunity of two months to try to find a buyer who would buy subject to her interest,⁸⁵⁸ which demonstrates a token, albeit unrealistic, degree of flexibility.

Fox has argued that creditors almost invariably prevail, since the value of the home to an occupier is minimised when weighed against the concrete financial claims of creditors.⁸⁵⁹ In asserting the need for a legal concept of home, she argues that the home represents a complex and multi-dimensional amalgam of financial, practical, social, psychological, cultural, politico-economic and emotional interests to its

⁸⁵⁶ Section 15 of TLATA, or, *The Importance of Being Earners op. cit.*, p. 6.

⁸⁵⁷ *Op. cit.*, para. 59.

⁸⁵⁸ *Op. cit.*, para. 63.

⁸⁵⁹ Lorna Fox *The Meaning of Home: A Chimerical Concept or a Legal Challenge?* (2002) 29(4) J. Law & Soc. 580 at 601, 607.

occupiers⁸⁶⁰ and she urges that policymakers should explicitly consider whether an occupier's intangible attachment to the home ought to add weight to their claims when seeking to defend proceedings brought by creditors.⁸⁶¹ Barlow suggests that the justification for the pro-creditor stance of the law may be that it is right that in marriage-like relationships, the fortunes of the partners stand or fall together.⁸⁶²

Smith's view is that the introduction of secured creditors is dubious, because it is far from clear that one beneficiary should be able to damage the interest of other beneficiaries by mortgaging his or her beneficial interest to a greater extent than if the interest is sold.⁸⁶³ There is no requirement that the security is over the beneficial interest under the trust and a mortgagee of other property of that beneficiary falls within (d). Yet what Smith does not discuss is that in evaluating the competing interests of secured creditors and other beneficiaries, the secured creditor may well be blameless and on balance should be able to enforce its security.⁸⁶⁴ This can operate unfairly against a beneficiary in occupation of the property, but this may be seen as the lesser of two evils by the judiciary.

Gray and Gray comment⁸⁶⁵ that the courts have not let their concern for the lender's commercial interests to be deflected by reference to the principle of respect for 'private and family life' and for the 'home' enshrined in Article 8 of the European Convention on Human Rights and that the major thrust of the House of Lords majority ruling in *Harrow London Borough Council v. Qazi*⁸⁶⁶ is that Article 8 is not violated by the simple enforcement of entitlements which have been determined to belong to parties as a matter of private domestic law. Various attempts to invoke the

⁸⁶⁰ *Ibid.*, p. 607.

⁸⁶¹ *Ibid.*, p. 609.

⁸⁶² Anne Barlow *Rights in the family home- time for a conceptual revolution?* in *New Perspectives on Property Law, Human Rights and the Home op. cit.*, ch. 3 at p. 70.

⁸⁶³ *Property Law op. cit.*, p. 322.

⁸⁶⁴ *Emmet and Farrand on Title op. cit.*, R. 47 para. 22-035 notes that since lenders in practice tend to prefer their borrowers' land to be saleable, it could conceivably become recommended practice for mortgagees to insist that mortgagors who are acquiring land as co-owners do so expressly on trust for sale.

⁸⁶⁵ *Land Law* (Butterworths Core Text Series) *op. cit.*, para. 8.35.

⁸⁶⁶ [2003] U.K.H.L. 43, [2003] 3 W.L.R. 792. See Ian Loveland *The Impact of the Human Rights Act on Security of Tenure in Public Housing* [2004] P.L. 594, Susan Bright *Ending Tenancies by Notice to Quit: The Human Rights Challenge* (2004) 120 L.Q.R. 398 and Martin Davis and David Hughes *An End of the Affair- Social Housing, Relationship Breakdown and the Human Rights Act 1998* [2004] 68 Conv. 19 at 29-38.

Article 8 protection in the context of disputes between creditors and home occupiers have been unsuccessful.⁸⁶⁷ An appeal is pending in *Jackson v. Bell*⁸⁶⁸ on the issue of whether in the light of the terms of section 335A and Article 8 of the European Convention on Human Rights, the construction and application of section 335A was the appropriate one in the view of the competing interests.

Conclusion

Sections 14 and 15 have introduced the potential for greater flexibility into the law. Due to the wording of section 15(1), as was demonstrated in *Shaire*, courts have been armed with a tool to take a long-term view to arrive at a just solution balancing the interests of occupiers and secured creditors. If the remaining co-owner takes the initiative and presents proposals which in the long-term secure the financial interests of the secured creditor which was a factor lacking in *Achampong*, then section 15 will result in being welcomed as a worthwhile reform. Since judges are increasingly demonstrating a clear bias in favour of creditors, it may be questioned whether section 15 has given too much responsibility to the judiciary and whether policy should have been formulated by Parliament rather than relying on *ad hoc* developments in case law. Section 15(1) should not, however, be amended, so that courts can exercise their discretion in appropriate cases to achieve a just and fair result.

⁸⁶⁷ See review by Fox *The Meaning of Home: A Chimerical Concept or a Legal Challenge?* *op. cit.*, p. 597-598 of cases where Article 8 protection has been unsuccessful: *Re Karia* 2001 WL 1560733 p. 2 per Lightman J., *obiter* in *Birmingham Midshires Mortgage Services Ltd v. Sabherwal* *op. cit.*, at 264 (the Human Rights Act 1998 was not yet in force), *Ebert v. Venvil* Unreported, 19 December 2000, LexisNexis paras. 15-18 per Aldous L.J. This should be compared with the optimistic view of Helene Pines Richman *Using the Human Rights Act to Save the Family Home* (2000) 150 N.L.J. 1102. See also Jackie Jones *The Trusts of Land and Appointment of Trustees Act 1996- the case law in relation to bankruptcy so far* (2001) 23 J.S.W.F.L. 353 who concludes at 361 that if the balance has tipped in favour of families and against creditors in relation to orders sought by a trustee in bankruptcy under section 14, she has seen very little evidence of it.

⁸⁶⁸ [2001] E.W.C.A. Civ. 387, [2001] B.P.I.R. 612. Sir Andrew Morritt V.-C. held para. 24 that there is an important point for the Court of Appeal to consider as to how the balance is to be struck between the rights and interests of the bankrupt's family and creditors.

CHAPTER 10- IMPROVING CONVEYANCING EFFICIENCY BY REDRAFTING SECTION 16?

Section 16 provides protection for purchasers of unregistered land without actual notice where trustees have acted beyond their powers in certain specified circumstances. One of the main principles of the 1925 legislation was that dealings with equitable interests and matters of trust management should be kept off the legal title and be of no concern to purchasers. Although this approach is maintained in the 1996 Act, it is unfortunate that section 16 is riddled with inconclusive and recondite phraseology which undermines conveyancing efficiency due to the broad circumstances in which conveyances may be invalidated. Such an approach may be seen as a way of counter-balancing the greater insecurity to which beneficiaries are made subject by the grant of such wide powers to trustees of land. Yet conveyancing efficiency could be improved by amending section 16 in order to reduce the circumstances in which conveyances may be invalidated and thus diminish the divergence between land with unregistered title and land to which title is registered.

Although section 16 is of diminishing importance due to the spread of registration of title, any dispute about whether a conveyance is invalid is likely to arise in the context of a disposition by trustees of unregistered land which triggers compulsory first registration with the issue arising in the context of proceedings for alteration of the register under Schedule 4 of the Land Registration Act 2002. The fact of registration is an important additional factor in the protection of the purchaser and will considerably lessen the divergence between unregistered and registered land.

Should section 16(1) be amended?

Section 16(1) provides that, 'A purchaser of land which is or has been subject to a trust need not be concerned to see that any requirement imposed on the trustees by section 6(5), 7(3) or 11(1) has been complied with.' The effect of section 16(1) is that a purchaser need not be concerned with whether the trustees have had regard to the rights of the beneficiaries under section 6(5), have obtained the consent of

beneficiaries to a partition under section 7(3) or have consulted the beneficiaries under section 11(1).⁸⁶⁹

Meaning of 'need not be concerned to see'?

Section 16(1) raises the question of what the phrase 'need not be concerned to see' means. These words are imprecise and a perfunctory scrutiny might suggest that a purchaser who actually knows of the breach would not be protected in such circumstances, since section 16(1) may only relieve of liability where a purchaser fails to make such inquiries as a reasonable purchaser would make rather than in cases of actual notice or knowledge. However, the view of Kenny and Kenny⁸⁷⁰ is that the purchaser has no positive duty to investigate these matters; a purchaser is not affected by failure to make enquiries which a reasonably competent purchaser would make; if the purchaser actually knows of the breach, the wording suggests that even actual knowledge does not damnify the purchaser; however, a purchaser who is a party to a breach and to equitable fraud is liable to have the sale impeached and will not be protected by section 16(1).

*Emmet and Farrand on Title*⁸⁷¹ equates the wording in section 16(1) with the wording in section 27(1) of the Law of Property Act 1925⁸⁷² 'shall not be concerned with the trusts affecting the proceeds of sale of land subject to a trust for sale' and state that it is 'the same in effect to protect purchasers as part of the overreaching provisions despite their having actual or constructive notice of the trusts affecting the land or its proceeds.' Section 26(3) of the Law of Property Act 1925 uses similar language 'a purchaser shall not be concerned to see' in connection with consultation with beneficiaries and there is a lack of academic and judicial comment on its interpretation.⁸⁷³

⁸⁶⁹ The sections referred to in section 16(1) deal with the private relations between trustees and beneficiaries and matters of internal trust management. It would not be appropriate for a purchaser to have to investigate such matters: see MacKenzie, Walker and Walton *op. cit.*, p. 71.

⁸⁷⁰ *Op. cit.*, p. 23.

⁸⁷¹ *Op. cit.*, R. 40 para. 22.037. See also Whitehouse and Hassall *op. cit.*, para. 2.169 footnote 1.

⁸⁷² Section 27(1) states that, 'A purchaser of a legal estate from trustees of land shall not be concerned with the trusts affecting the land, the net income of the land or the proceeds of sale of the land whether or not those trusts are declared by the trust instrument as that by which the trust of land is created.'

⁸⁷³ A.M. Prichard *Express Trusts* (1973) 117 S.J. 518 focuses exclusively on section 26(3), but does not refer to this aspect of it.

Is good faith a requirement of section 16(1)?

Emmet and Farrand on Title ventures further by stating that, ‘However, it appears clear that a purchaser should not be protected unless he takes “in good faith” it is thought that collusion, for example, rather than mere actual notice of breach would need to be shown’.⁸⁷⁴ This is derived from the definition of the word ‘purchaser’ which has the same meaning as the Law of Property Act 1925 which by section 205(1)(xxi) requires a purchaser to be in good faith. If the erroneous view of Graham J. in *Peffer v. Rigg*⁸⁷⁵ is adopted that, ‘He cannot in my judgment be in good faith if he has in fact notice of something which affects his title’, then this would severely limit the protection purported to be given to purchasers by section 16(1) and would go wider than collusion referred to in *Emmet and Farrand on Title*. *Ruoff and Roper on the Law and Practice of Registered Conveyancing*⁸⁷⁶ takes a wider view commenting on the position in registered land that, ‘On the question of good faith, it may be asked whether a purchaser can ignore express information which he has about a contemplated breach of trust by a single trustee-proprietor registered without a restriction. He can scarcely be treated as having good faith when he knows he has bought in direct breach of trust.’

The view expressed in *Emmet and Farrand on Title* is curious, because section 23(1) of the 1996 Act states that ‘purchaser’ has the same meaning as Part I of the Law of Property Act 1925 and section 205(1)(xxi) seems to make it clear that in Part I good faith is not incorporated within the definition, although *Ruoff and Roper* question whether the exception which applies to Part I amounts to an entirely separate

⁸⁷⁴ *Op. cit.*, R. 40 para. 22-037. A similar view is shared by Nigel P. Gravells *Land Law: Text and Materials* (2nd edn 1999) p. 335 who states that it must be questioned whether a purchaser is protected under section 16(1) where he is a party to the breach of the relevant duty.

⁸⁷⁵ [1977] 1 W.L.R. 285 at 294 where Graham J. was construing section 3(xxi) of the Land Registration Act 1925. For criticism of this view, see Gray and Gray *op. cit.*, p. 1060-1062. Gray and Gray note *inter alia op. cit.*, p. 1062 footnote 13 that this conflicts with the view expressed by Brightman J. in *De Lusignan v. Johnson* (1973) 230 E.G. 499, who took the view that only fraud was relevant in this context, which is the preferable view and which was favoured in *Burr v. Copp* [1983] C.L.Y. 2057. See also David Hayton *Purchasers of Registered Land* [1977] C.L.J. 227, F.R. Crane *Notes of Recent Cases* [1977] Conv. 207, Roger J. Smith *Registered Land: Purchasers with Actual Notice* (1977) 93 L.Q.R. 341, Jill Martin *Constructive Trusts of Registered Land* [1978] Conv. 52. The Land Registration Act 2002 avoids the problems posed by *Peffer v. Rigg*, *inter alia*, by creating the concept of owner’s powers in sections 23 and 26, but this does not have any bearing on the interpretation of section 16(1) of the 1996 Act, because of the reference by virtue of section 23(1) of the 1996 Act to the definition of purchaser in the Law of Property Act 1925.

⁸⁷⁶ R.B. Roper, C. West, R. Fearnley, J. Donaldson, Francis Twambley (6th edn 1991 looseleaf) R.12 para. 32-17. The latest update, R. 24 (October 2003), does not deal with these issues.

definition of a purchaser or whether it merely substitutes ‘money or money’s worth’ for ‘valuable consideration’ in the principal definition.⁸⁷⁷ *The Encyclopaedia of Forms and Precedents*⁸⁷⁸ adopts a more dogmatic view by stating that, “‘Purchaser’ means a person who acquires an interest in, or charge on, property for money or money’s worth’, thus omitting the reference to good faith. The better view is that good faith is not part of the definition of purchaser for the purposes of Part I of the 1925 Act.

Utility of section 16(1)?

The purpose of section 16(1) is to make it clear what enquiries a purchaser does not have to make. If a purchaser knows that in making the disposition, the trustees are acting in breach of trust by not complying with the requirements of sections 6(5), 7(3) or 11(1), a purchaser may be subject to *in personam* liabilities in equity for knowing receipt.⁸⁷⁹ In order to improve the statutory provisions, section 16(1) should be amended to state that, ‘A purchaser shall not be concerned with any breach of any requirements imposed on the trustees by sections 6(5), 7(3) or 11(1) unless the purchaser colludes with the trustees in such breach.’

Shift in strengthening the security of beneficiaries?

Section 16(2) and section 16(3) represent an undesirable shift away from giving absolute primacy to considerations of conveyancing efficiency and towards strengthening the security of beneficiaries in land held upon trust. Section 16(2) states that, ‘Where (a) trustees of land who convey land which (immediately before it is conveyed) is subject to the trust contravene section 6(6) or (8), but (b) the purchaser of the land from the trustees has no actual notice of the contravention, the contravention does not invalidate the conveyance.’ Section 16(3) states that, ‘Where the powers of trustees of land are limited by virtue of section 8- (a) the trustees shall take all reasonable steps to bring the limitation to the notice of any purchaser of the land from them, but (b) the limitation does not invalidate any conveyance by the trustees to a purchaser who has no actual notice of the limitation.’

⁸⁷⁷ *Op. cit.*, R.19 para. 32-08 footnote 3.

⁸⁷⁸ Vol. 40(2) *op. cit.*, para. 487 footnote 1 [3313].

⁸⁷⁹ See generally Underhill and Hayton *op. cit.*, p. 970-979 and Hayton and Marshall *op. cit.*, paras. 11-110-11-114.

The rationale behind these subsections is that due to the extension of trustees' powers by section 6, there is no obvious way in which a purchaser can ascertain whether there are any limitations on the powers of trustees of unregistered land other than by relying on information volunteered by trustees. Yet Ferris and Battersby⁸⁸⁰ are surprisingly acquiescent in not challenging the implications of this retrograde step of forgoing pre-eminence to conveyancing efficiency, which should remain the overriding consideration. The subsections are expressed in the negative, which makes it problematic to state dogmatically what the corollary of the positive is.⁸⁸¹ It would have been much easier if this had been spelt out in the subsections. In section 16(2), making assumptions from the negative propositions, overreaching will not occur (although the section does not say so explicitly) where the purchaser has actual notice that the trustees of land contravened section 6(6) or (8) and in section 16(3), making the same assumptions, overreaching will not occur where a purchaser has actual notice of a limitation by virtue of section 8.

Ferris and Battersby state that the drafting of section 16(2) and (3) suggests that those provisions are designed to prevent overreaching occurring.⁸⁸² Thus the Act does not show any intention to abolish overreaching, but it does show an intention to curtail the operation of overreaching in some situations. Section 16(2) expresses a legislative policy that has shifted since the enactment of section 2 of the Law of Property Act 1925.⁸⁸³ Section 2 protected even the purchaser with actual notice of wrongdoing on the part of trustees for sale. Section 16(2) refuses protection to purchasers with actual notice of relevant trustee wrongdoing. The legislation carefully continues to shield innocent purchasers, but refuses to shield purchasers who realise that their purchase is made in breach of statutory duties owed by the trustees to the beneficiaries. Section 16(3)(b) marks an extension of the protection formerly offered to purchasers, but the change introduced in section 8 increases the hazards facing purchasers and so this

⁸⁸⁰ Graham Ferris and Graham Battersby *The General Principles of Overreaching and the Modern Legislative Reforms, 1996-2002* (2003) 119 L.Q.R. 94 at 118-119.

⁸⁸¹ See Graham Ferris and Graham Battersby *The Impact of the Trusts of Land and Appointment of Trustees Act 1996 on Purchasers of Registered Land* [1998] Conv. 168 at 176. Nicholas Hopkins *The Trusts of Land and Appointment of Trustees Act 1996 op. cit.*, at 427 states that the corollary of both provisions is that a conveyance is invalidated by a purchaser's actual notice.

⁸⁸² [1998] Conv. 168 *op. cit.*, at 187.

⁸⁸³ See Ferris and Battersby (2003) 119 L.Q.R. 94 *op. cit.*, at 118-119.

favouring of them is also explicable in the light of the whole package of reform contained in the 1996 Act.

Meaning and effect of ‘invalidate the conveyance’?

Invalidity in law?

The main protagonist of the view that a purported conveyance has no effect, which is synonymous with the conveyance being void, is Hopkins, who regards this stance as self-evident, with the effect that he does not offer concrete substantiation for his view.⁸⁸⁴ Hopkins’ analogy of section 18 of the Settled Land Act 1925⁸⁸⁵ is not wholly convincing, since section 18 is better drafted than section 16 of the 1996 Act, since it is unambiguous, because it states the consequences clearly by stating that the disposition will be void except for the purpose of conveying or creating equitable interests.

By way of contrast Ferris and Battersby’s view is that section 16(2) and (3)(b) cannot refer to any invalidity in law, since trustees of land have the legal estate vested in them and therefore the ability to convey that estate without recourse to the authority bestowed by section 6.⁸⁸⁶ Ferris and Battersby reject⁸⁸⁷ on a number of questionable grounds the interpretation advanced by Hopkins⁸⁸⁸ that a purported conveyance will not convey the legal title if the purchaser knows of the breach.⁸⁸⁹ First, they argue that one of the grounds for adopting a different interpretation is the first class enumerated by Kekewich J. in *Churche v. Martin*⁸⁹⁰ ‘the sense of the language used’. In their view, since section 16 is headed ‘Protection of purchasers’, if section 16 can have the

⁸⁸⁴ *The Trusts of Land and Appointment of Trustees Act 1996 op. cit.*, p. 427.

⁸⁸⁵ Section 18(1)(a) provides that ‘any disposition by the tenant for life or statutory owner of the land, other than a disposition authorised by this Act or any other statute shall be void, except for the purpose of conveying or creating such equitable interests as he has power, in right of his equitable interests and powers under the trust instrument, to convey or create’.

⁸⁸⁶ [1998] Conv. 168 *op. cit.*, at 176-177.

⁸⁸⁷ (2003) 119 L.Q.R. 94 *op. cit.*, at 110.

⁸⁸⁸ *The Trusts of Land and Appointment of Trustees Act 1996 op. cit.*, at 427. Ferris and Battersby state (2003) 119 L.Q.R. 94 *op. cit.*, at 109 footnote 47 that this construction also seems to be accepted by H.M. Land Registry *Practice Leaflet* No. 13 at para. E2.2, but an analysis of what is actually the *Practice Advice Leaflet* No. 13 reveals that it is general rather than specific and does not tackle the issue directly.

⁸⁸⁹ Whitehouse and Hassall *op. cit.*, para. 2.167 agree with the view of Ferris and Battersby and state that the limitations considered in section 16(2) and (3) must refer to invalidity in equity given that, as the legal estate is vested in the trustees, they have the power to convey it.

⁸⁹⁰ (1889) 42 Ch. D. 312 at 317.

effect of rendering a conveyance invalid at law, then in this respect it is not protective of purchasers. This argument is not convincing, since section 16 can indeed be construed as protective of purchasers, because section 16(2) and (3) are drafted in such a way that spell out when the contravention does not invalidate the conveyance, thus protecting purchasers in such specified circumstances but not otherwise.

Secondly, they maintain that the third class of Kekewich J.'s analysis, which is the strict meaning being inconsistent with some other principle which there is no intention to disturb, can be invoked due to the damage Hopkin's interpretation would inflict on long established legal principle. It is here that Ferris and Battersby find themselves in troubled water. They assert that no breach of sections 6(6), 6(8), 8(1) or 8(2) can affect the ability of trustees to dispose of their legal estate, which is inherent in them as legal owners, and any construction that gives provisions of section 16 invalidating effects in law would be a reading of the section which offends against this very long established principle. This argument is unsustainable, because breach of those sections does not remove the inherent ability to dispose of the legal estate; this remains intact. Rather a breach imposes a subsequent, superimposed inability in the circumstances set out in section 16(2) and (3).

Lastly, Ferris and Battersby assert that the invalidity is restricted to invalidity in equity, because the operative protective parts of section 16(2) and (3) restrict the operation of the doctrine of notice. Ferris and Battersby are here confusing two separate issues. The reference to notice in sections 16(2)(b) and 16(3)(b) is not determinative of the issue whether the conveyance is invalid in law or equity. It is to put the cart before the horse to maintain otherwise. Their argument cannot be justified when the authority which they cite,⁸⁹¹ *Bowes v. East London Water Works Company*,⁸⁹² is scrutinised. It is unfortunate that Ferris and Battersby do not analyse *Bowes* at all but state merely,⁸⁹³ 'This construction reflects the analysis of trustee'⁸⁹⁴ powers by Lord Eldon in *Bowes v. East London Water Works Company*. Yet there is no analogy between section 16(2) and (3) and the *Bowes* case. *Bowes* did not concern

⁸⁹¹ (2003) 119 L.Q.R. 94 *op. cit.*, at 111.

⁸⁹² (1820) Jacob 324 at 330.

⁸⁹³ (2003) 119 L.Q.R. 94 *op. cit.*, at 111.

⁸⁹⁴ Presumably a misprint for 'trustees'.

a statutory provision but a limitation upon the power of leasing by the trustees which was breached. Lord Eldon's reasoning is clearly limited to the facts of the case before him and was substantially that, 'The decree declares the leases to be void; by which, I presume, it is to be understood that they were to be void in equity; for the lessors having the legal estate, the power did not restrain their faculty of dealing with it at law'.⁸⁹⁵ This has no bearing upon the construction of section 16(2) and (3).

Invalidity in equity?

The second possible construction is that invalidity means equitable invalidity, which has been advocated by Ferris and Battersby.⁸⁹⁶ Whitehouse and Hassall agree with the view of Ferris and Battersby and state that the limitations considered in section 16(2) and (3) must refer to invalidity in equity given that, as the legal estate is vested in the trustees, they have the power to convey it.⁸⁹⁷ The merit of this view is that it has the effect of rendering the subsection protective of purchasers and thus harmonises with the heading to the section 'protection of purchasers'.

However, Ferris and Battersby's argument, that breach of sections 8(1), 8(2), 6(6) and 6(8) renders the conveyance void in equity deriving from an *ultra vires* breach of trust and incapable of overreaching any equitable interest, is problematic, because where a purchaser has actual notice of the limitation in the case of a breach of section 8(1), the legal estate will not pass, whereas it will pass in cases of a breach of section 8(2) or sections 6(6) and 6(8) but subject to equitable interests under the trust. They maintain that this effect of a breach of sections 6(6), 6(8), 8(1) and 8(2) on the operation of section 2 of the Law of Property Act 1925 in turn is consonant with their construction of invalidity in section 16. A closer analysis, however, reveals that this analysis is in fact circular, using their conclusion to justify their proposition, which they have not proved.

No foundation for Ferris and Battersby's arguments is to be found in the Law Commission Report which did not envisage conveyances being invalidated at all,

⁸⁹⁵ *Op. cit.*, at 330.

⁸⁹⁶ (2003) 119 L.Q.R. 94 *op. cit.*, at 111.

⁸⁹⁷ *Op. cit.*, para. 2.167.

since it merely states that, ‘there will be no derogation from the principle that a purchaser should not be required to examine a trust instrument to determine the validity of a conveyance. Therefore, we recommend that purchasers should not be affected by an express limitation of the trustees’ powers unless they have notice of that limitation.’⁸⁹⁸ There is, however, no indication of the effect of notice of that limitation. There is no precursor for section 16(2) in the draft Bill annexed to the Law Commission Report,⁸⁹⁹ but section 16(3)(b) had an earlier incarnation as the proposed section 28A(2)(b) of the Law of Property Act as incorporated by clause 4 of the draft Bill. This stated that, ‘Where land subject to a trust is not so registered- (a) a purchaser of the land is entitled to assume that the powers of the trustees are not limited by virtue of section 28(10) of this Act unless he has actual notice to the contrary; and (b) in favour of a purchaser without such notice such a limitation shall not invalidate any exercise of those powers.’ It is notable that this provision speaks in terms of invalidating powers and not conveyances.

Incapable of overreaching the equitable interests under the trust?

The third possible construction is the least plausible. It is that ‘invalid’ might be taken as synonymous with ‘incapable of overreaching the equitable interests under the trust’ with the result that section 16 contains an implied reference to section 2 of the Law of Property Act 1925.⁹⁰⁰ On this basis section 16(2) and (3) allows section 2 of the Law of Property Act to operate unless a purchaser has actual notice of a breach of section 16(2) and (3). This construction is flawed, because it treats the protection offered by these subsections as wholly effected by the operation of section 2 of the Law of Property Act 1925. Ferris and Battersby draw support for this construction from clause 4 of the draft Bill attached to the Law Commission Report, the proposed section 28A(2)(b) of the Law of Property Act, which would have provided that, ‘in favour of a purchaser without such notice such a limitation shall not invalidate any exercise of those powers.’

⁸⁹⁸ Law Com. No. 181 para. 10.10.

⁸⁹⁹ See Ferris and Battersby (2003) 119 L.Q.R. 94 *op. cit.*, at 111 footnote 52.

⁹⁰⁰ *Ibid.*, p. 113-114.

It is unfortunate that no explanation was offered by the House of Lords or by the *Notes on Clauses* as to why ‘invalidity’ was applied to the conveyance and why the essential link between the statutory intention and the powers of the trustees was obscured. Contrary to the view of Ferris and Battersby, it is too far-fetched and somewhat dubious to treat invalidity as tied to the potential operation of section 2 of the Law of Property Act 1925 in order to reunite the statutory protection with the authority of the trustees to act, as was originally intended.⁹⁰¹ Ferris and Battersby reject the first interpretation and prefer the third interpretation to the second for reasons which remain questionable.

Retrograde step in insertion of concept of actual notice?

Introduction of the concept of actual notice in section 16(2), (3) and (5) into land law is inevitably a regressive measure.⁹⁰² Unfortunately neither the Law Commission Report⁹⁰³ nor the *Notes on Clauses*⁹⁰⁴ nor the draft Bill attached to the Law Commission Report⁹⁰⁵ throw any light on the interpretation of actual notice. Actual notice is the simple case where the purchaser subjectively knew of the equitable interest.⁹⁰⁶ Ferris and Battersby suggest⁹⁰⁷ that ‘actual notice’ should be distinguished from ‘knowledge’⁹⁰⁸ and ‘actual knowledge’.⁹⁰⁹ This is unobjectionable, since although knowledge is absolutely necessary with regard to actual notice,⁹¹⁰ notice and knowledge are not synonymous.⁹¹¹

⁹⁰¹ *Ibid.*, p. 114.

⁹⁰² See Ferris and Battersby [1998] Conv. 168 *op. cit.*, at 177.

⁹⁰³ Law Com. No. 181 para. 10.10.

⁹⁰⁴ *Op. cit.*, paras. 163 and 164.

⁹⁰⁵ Clause 4(2).

⁹⁰⁶ Hanbury and Martin *op. cit.*, p. 36.

⁹⁰⁷ [1998] Conv. 168 *op. cit.*, at 177.

⁹⁰⁸ Knowledge of the type required to establish liability for ‘knowing receipt’: see *Re Montagu’s Settlement Trusts*. Cases exploring knowledge have produced reasoning which is far from simple or free from difficulty. See *Selangor United Rubber Estates Ltd v. Cradock (No. 3)* [1968] 1 W.L.R. 1555, *Karak Rubber Co. Ltd v. Burden (No. 2)* [1972] 1 W.L.R. 602, *Carl Zeiss Stiftung v. Herbert Smith and Co. (No. 2)* [1969] 2 Ch. 276, *Belmont Finance Corporation v. Williams Furniture Ltd (No. 1)* [1979] Ch. 250, *Baden v. Société Générale*, *Royal Brunei Airlines Sdn. Bhd. v. Tan* [1995] 2 A.C. 378; Ferris and Battersby [1998] Conv. 168 *op. cit.*, at 177 footnote 25.

⁹⁰⁹ As used in sections 24 and 25 of the Law of Property Act 1969. Ferris and Battersby argue [1998] Conv. 168 *op. cit.*, at p. 178 footnote 27 that the provisions of sections 24(4) and 25(11) suggest that the expression *prima facie* excludes imputed notice.

⁹¹⁰ See Underhill and Hayton *op. cit.*, at p. 988-989. The exception is where registration under the Land Charges Act 1972 is deemed to give persons actual notice.

⁹¹¹ See Millett J. in *Rignall Developments Ltd v. Halil op. cit.*, at 202 and Sir Robert Megarry V.-C. in *Re Montagu’s Settlement Trusts op. cit.*, at 271-272, 273 and 278.

The expression should be understood as including imputed actual notice of an agent, since it seems peculiar to exclude such notice in transactions in which a professional agent will be interposed between the trustees and the purchaser. Actual notice of an agent must surely be treated the same as the actual notice of the principal. Ferris and Battersby maintain that actual notice including imputed notice is a reading well supported by judicial authority.⁹¹² Yet the authorities cited by Ferris and Battersby do not axiomatically support this proposition. Lord Chelmsford L.C. in *Espin v. Pemberton*⁹¹³ in unnecessarily blurring the categories of constructive and actual notice was not required to interpret the term actual notice and it was not necessary to the decision to find actual notice. His statement is *obiter* and is not even cited in full. Ferris and Battersby omit quoting the end of the paragraph where Lord Chelmsford L.C. admits that, ‘if it is necessary to make a distinction between the knowledge which a person possesses himself, and that which is known to his agent, the later might be called imputed knowledge.’⁹¹⁴ Thus *Espin v. Pemberton* cannot be relied upon as support for their proposition.

Ferris and Battersby also rely on the *ratio decidendi* in *Rolland v. Hart*,⁹¹⁵ a case which concerned priority between two mortgagees where Lord Hatherley L.C. stated,⁹¹⁶ ‘Then the only question is, what is actual notice? It has been held over and over again that notice to and about a matter as to which it is part of his duty to inform himself, is actual notice to the client.’ A number of problems arise from this. First, there is no duty in section 16 on a purchaser to inform himself of the matters considered in section 16(2), (3) and (5).

Secondly, it is unfortunate that Lord Hatherley L.C. does not state specifically upon which cases he is relying. Counsel for the first mortgagee stated in argument that,

⁹¹² [1998] Conv. 168 *op. cit.*, at 178.

⁹¹³ (1859) 3 G. & J. 547 at 554 where he stated that, ‘The notice, which a client is supposed to receive through his solicitor, is generally treated as constructive notice. I think it would tend very much to clearness in these cases if it were classed under the head of actual notice.’ This is unwarranted confusion of terminology, since this is not generally considered as constructive notice. Ferris and Battersby themselves readily admit [1998] Conv. 168 *op. cit.*, at 178 footnote 28 that constructive notice is excluded from actual notice.

⁹¹⁴ *Op. cit.*, at 554.

⁹¹⁵ (1871) 6 Ch. App. 678 at 681-682 and 684.

⁹¹⁶ *Ibid.*, at 681-682.

‘This case is governed by *Le Neve v. Le Neve*’,⁹¹⁷ which involved priority between two wives. Yet the *ratio decidendi* of Lord Hardwicke L.C. in *Le Neve v. Le Neve* was that ‘the taking of a legal estate after notice of a prior right, makes a person a *male fide* purchaser this is a species of fraud’⁹¹⁸ which is inapplicable to section 16. Lord Hardwicke L.C. expressed most illuminatingly, ‘.... who ought to suffer, the person intrusting an agent, or a stranger who did not employ him? He certainly who trusts most ought to suffer most.’⁹¹⁹ In section 16 it is not intended that the purchaser should suffer the most. In *Rolland v. Hart* Lord Hatherley L.C. concluded, ‘..... if actual notice is proved, then a man cannot take advantage of his registration to invalidate a previous unregistered security.’ Thirdly, it is notable that Lord Hatherley L.C. was construing notice in the context of case law and not actual notice in a legislative provision. Section 16 is headed ‘Protection of purchasers’ and if actual notice in section 16 is extended to include imputed notice, this will dramatically weaken the protection for purchasers, which was not the purpose of these provisions.

A far better justification for the argument that actual notice must include imputed notice is to avoid a construction which will avoid absurdity as in *Abbey National Building Society v. Cann*.⁹²⁰ It would be absurd for trustees to communicate with the purchaser directly and unduly onerous for section 16 to impose a requirement as part of the conveyancing procedure that the purchaser’s solicitor furnish to the vendor’s solicitor signed confirmation from the purchaser that he has received notice of certain matters. It is right that constructive notice is excluded, but a solicitor must be estopped from denying that he has actual notice if he does not read a particular document and there must be actual notice of every document which a solicitor receives. In addition blind eye knowledge in this context should be equated with actual notice.⁹²¹

⁹¹⁷ (1748) 3 Atk. 646.

⁹¹⁸ *Ibid.*, at 654.

⁹¹⁹ *Ibid.*, at 655.

⁹²⁰ See Lord Bridge *op. cit.*, at 75-76 discussing conveyancing absurdities under section 70(1)(g) of the Land Registration Act 1925 and the necessity to avoid such conveyancing absurdities in construing the statutory provision. This problem has now been avoided by the Land Registration Act 2002.

⁹²¹ See *Manifest Shipping Co. Ltd v. Uni-Polaris Shipping Co. Ltd*.

There is no consequence of failure by the trustees in section 16(3) to take reasonable steps to tell a purchaser that their powers are limited, other than breach of trust, which will be applicable in any event. The 1996 Act gives no guidance as to what constitutes reasonable steps in this context.⁹²² The duty is to take reasonable steps rather than absolute ones. But in a simple case of limitations in the trust disposition, reasonable steps would surely consist of sending a copy of them to the purchaser or his solicitors if he was represented.⁹²³ *Emmet and Farrand on Title* states that section 16(3) may be thought to be a disincentive to investigation of title.⁹²⁴ Hopkins highlights reference to notice of the ‘limitation’ rather than ‘contravention’, which places the onus on a purchaser who does have actual notice of a limitation to ensure that it has been complied with.⁹²⁵ A conveyance is not invalidated where a purchaser has no actual notice of the limitation, but this is inconceivable if the trustees comply with section 16(3)(a) and inform the purchaser of the limitation. What is most significant about section 16(3) is that a purchaser is bound to have notice, because section 8(1) provides that provision must be in the disposition. This raises question marks over the significance of section 16(3)(a), which should be rendered otiose within the statutory framework.

Does section 16 overrule *Flegg* in relation to registered land?

Ferris and Battersby’s arguments

Section 16(7) states that, ‘This section does not apply to registered land.’ Ferris and Battersby argue, *inter alia*, that the 1996 Act has overruled *City of London Building Society v. Flegg* in respect of registered land.⁹²⁶ Their argument is that any *ultra vires* disposition by trustees will not overreach beneficial interests;⁹²⁷ one result of section 6 of the 1996 Act is that a disposition in breach of trust is not within the trustees’

⁹²² MacKenzie, Walker and Walton *op. cit.*, p. 71-72.

⁹²³ Barraclough and Matthews *op. cit.*, para. 10.3.

⁹²⁴ *Op. cit.*, R. 40 para. 22.037.

⁹²⁵ *The Trusts of Land and Appointment of Trustees Act 1996 op. cit.*, at 427.

⁹²⁶ [1998] Conv. 168ff *op. cit.* An analogous argument was advanced on different grounds by Sydney M. Clayton *Void Mortgages?* [1981] Conv. 19: see Thompson *Modern Land Law op. cit.*, p. 250.

⁹²⁷ This view was argued by Charles Harpum in *Overreaching, Trustees’ Powers and the Reform of the 1925 Legislation op. cit.*, p. 294. Peter Gibson L.J. in *State Bank of India v. Sood op. cit.*, at 281 expressly based his judgment on the arguments advanced by Harpum when he stated that, ‘Mr. Harpum argued cogently that a transaction made by a person within the dispositive powers conferred upon him will overreach equitable interests in the property the subject of the disposition, but *ultra vires* dispositions will not, and the transferee with notice will take the property subject to those interests.’ In the *Sood* case itself it was accepted at 286 that the disposition was *intra vires*.

authority⁹²⁸ and therefore will not overreach the beneficial interests; some provisions in section 16 of the 1996 Act protect a purchaser in good faith of unregistered land from that invalidating effect; there is no valid reason to suppose that overreaching does, or should, operate in relation to registered land in any way differently from its operation in relation to unregistered land;⁹²⁹ similar provisions are required to protect a purchaser of registered land from invalidity if divergence between the two conveyancing systems is to be avoided; the effect of section 16 excluding the protective provisions from application to a purchaser of registered land is to bring about a reversal, in relation to registered land, of *City of London Building Society v. Flegg* and thus the Act creates an unwelcome divergence between the two systems.

Ferris and Battersby argue that if the statutory mechanism of overreaching respects the distinction between *intra vires* and *ultra vires* dispositions, then section 16(2) and section 16(3)(b) were enacted to protect purchasers of unregistered land from the danger of *ultra vires* dispositions created by sections 6 and 8.⁹³⁰ It follows then, they state, that where there is a disposition in registered land, which contravenes sections 6(6) or 6(8) or a limitation imposed pursuant to section 8, it will not overreach the interests of beneficiaries under a trust of land. Their argument is that the mortgage granted to the City of London Building Society would have been *ultra vires* as a breach of section 6(6) if it had been granted after 1997. Therefore overreaching would not have occurred and Mr and Mrs Flegg would have had a subsisting interest in the land at the time the mortgage was granted.

Why Ferris and Battersby's arguments are problematic

Ferris and Battersby are wrong that the 1996 Act is a statutory reversal of the House of Lords decision in *Flegg*.⁹³¹ The Law Commission did not intend that the 1996 Act was to affect overreaching.⁹³² The Law Commission stated that, 'The overreaching

⁹²⁸ They state [1998] Conv. 168 *op. cit.*, at 175 that after 1996 the expression *ultra vires* indicates a disposition in breach of section 6(5), (6) or (8).

⁹²⁹ See Ferris and Battersby *ibid.*, at 179-184 for their three approaches to the question of why registered land is excluded from the provisions of section 16.

⁹³⁰ *Ibid.*, at 185.

⁹³¹ *Ibid.*, at 186. If the conclusion of Ferris and Battersby were to be intended, then such a change in the law would be signposted in a rather less cryptic way than this: see Thompson *Modern Land Law op. cit.*, p. 210.

⁹³² See Nigel Jones and P.J. Kirby *Are trustees at risk?* (2000) 22 T.& E.L.J. 16 at 17.

mechanism will operate much as it currently does in relation to trusts for sale'.⁹³³ The Lord Advocate, introducing the Bill on Second Reading in the House of Lords, made it clear that overreaching was to continue to apply when he stated,⁹³⁴ 'Existing protection for purchasers of land subject to a trust by way of the overreaching machinery is to be maintained'. The only proposal in the Law Commission's Report on overreaching which was introduced by the 1996 Act to include bare trusts within the statutory scheme,⁹³⁵ had the effect of extending overreaching rather than restricting it.⁹³⁶ It would seem very unlikely that a court could be persuaded that the 1996 Act has severely restricted the statutory mechanism of overreaching and there is great temptation in agreeing with the conclusion of Jones and Kirby that overreaching appears to have survived the 1996 Act unscathed.⁹³⁷

In *Birmingham Midshires Mortgage Services v. Sabherwal* Robert Walker L.J. considered that, 'The principal issue before the judge was whether the decision of the House of Lords in *City of London Building Society v. Flegg* [1988] A.C. 54 has been displaced by the enactment of the Trusts of Land and Appointment of Trustees Act 1996 ("the 1996 Act"). The trial judge, Mr Recorder Isaacs Q.C., sitting at the Central London County Court, had no hesitation in rejecting that argument.'⁹³⁸ Robert Walker L.J. did not interfere with this conclusion and indeed concluded himself, 'In this type of family situation, the concepts of trust and equitable estoppel are almost interchangeable, and both are affected in the same way by the statutory mechanism of overreaching, the substance of which is not affected by the 1996 Act.'⁹³⁹ Robert Walker L.J. felt some unease about the decision reached by the court quoting from Peter Gibson L.J. in *Sood*⁹⁴⁰ referring to the Law Commission's Report No. 188,⁹⁴¹

⁹³³ Law Com. No. 181 para. 6.2. See also paras. 6.1 and 20.2.

⁹³⁴ H.L. Debs., Vol. 569, col. 1718.

⁹³⁵ See Law Com. No. 188 *Transfer of Land Overreaching: Beneficiaries in Occupation* (1989) paras. 4.27 and 5.4.

⁹³⁶ Ferris and Battersby (2003) 119 L.Q.R. 94 *op. cit.*, at 125 are unduly pessimistic as to the extent the court can take into account Law Commission Reports relying on the restrictive approach of the majority of the House of Lords in *Black-Clawson International Ltd v. Papierwerke Waldhof-Aschaffenburg A.G.* [1975] A.C. 591. This, however, fails to take into account the broader views expressed in *Pepper v. Hart*: see Cross *op. cit.*, p. 160-161.

⁹³⁷ *Op. cit.*, p. 18.

⁹³⁸ *Op. cit.*, para. 1.

⁹³⁹ *Op. cit.*, para. 31.

⁹⁴⁰ *Op. cit.*, at 290.

⁹⁴¹ Paras. 4.3 and 5.3.

which has not been implemented, which recommended that a conveyance should not overreach the interest of a *sui juris* beneficiary of full age who was in occupation of land unless he gave his consent.⁹⁴²

Dixon regrets that Robert Walker's judgment is not quite a ringing endorsement of the continued validity of overreaching in registered land.⁹⁴³ Since the Birmingham Midshires' mortgage was executed in 1990 and its overreaching effect could not possibly be compromised by the 1996 Act, his view is that this leaves the Ferris/Battersby analysis unscathed.⁹⁴⁴ Dixon argues that the Ferris/Battersby analysis may be unsustainable.⁹⁴⁵ Even though the effect of the 1996 Act is to restrict the powers of trustees of land more than was previously the case, this does not necessarily mean that dispositions contravening these new limitations are *ultra vires* in the sense of compromising the title of a registered proprietor who has relied on overreaching. Dixon is correct that the mechanism for ensuring that trustees of registered land do have proper regard for the beneficiaries is to enter a restriction on the register and not to resort to an expanded *ultra vires* doctrine.⁹⁴⁶ It is not inconsistent for the 1996 Act to increase the circumstances in which trustees may be liable for breach of trust. Ferris and Battersby's arguments derive from a flawed premise, because there is no necessary correlation between trustee actions in breach of trust and actions which are *ultra vires* in the sense of destroying the overreaching effect of a registered disposition by two or more trustees of land.⁹⁴⁷

⁹⁴² See Harpum *Overreaching, Trusts of Land and Proprietary Estoppel op. cit.*, at 345-346.

⁹⁴³ Martin Dixon *Overreaching and the Trusts of Land and Appointment of Trustees Act 1996* [2000] Conv. 267 at 271-2.

⁹⁴⁴ Dixon is more positive in *Trusts of land, overreaching and estoppel* (2000) 30 S.L.R. 64 when he states that, 'this case provides strong evidence that two-trustee overreaching in registered land remains intact after TOLATA in the same circumstances as prior its entry into force.' Harpum also takes a more constructive view (2000) 116 L.Q.R. 341 *op. cit.*, at 342. Harpum states that, 'There was in any event nothing in TLATA to exclude overreaching. Indeed sections 2(1)(ii) and 27(2) of the Law of Property Act 1925, which regulate overreaching by requiring the payment of any capital monies to at least two trustees, had been amended by TLATA. This was to reflect the changes in terminology from "trusts for sale" to "trusts of land" that had been made by the Act.'

⁹⁴⁵ *Overreaching and the Trusts of Land and Appointment of Trustees Act 1996 op. cit.*, at 268.

⁹⁴⁶ *Ibid.*, at 269 footnote 12.

⁹⁴⁷ See Dixon *ibid.*, at 273.

In addition Ferris and Battersby's argument cannot be substantiated when they maintain⁹⁴⁸ that the situation is different with respect to a breach of trust that constitutes a breach of section 9 of the 1996 Act or a breach of a provision made by the settlor that the consent of three people is required before a disposition is made. They argue that they are *prima facie* capable of precluding overreaching, but a purchaser of registered land is able to shelter behind the same protective provisions as a purchaser of unregistered land. The only reasoning they offer is section 9(2) and section 10(1). These subsections do not constitute justification for this argument, since these subsections provide an element of protection for third parties and are independent of the overreaching provisions. One can perhaps assume that their thinking was influenced by the fact that sections 9 and 10 are not covered by section 16 and they are seeking justification for this omission. The better position, which is the traditional, orthodox approach, is that a breach of any of these provisions does not prevent overreaching from occurring.

Which breaches of trust are *ultra vires*?

Ferris and Battersby's arguments necessitate a close examination of what constitutes *ultra vires* breaches of trust. A transaction made by a person within the dispositive powers conferred upon him will overreach equitable interests in that property, but *ultra vires* dispositions will not.⁹⁴⁹ Section 2 of the 1925 Act does not detract from the fundamental principle that only *intra vires* dispositions can overreach.⁹⁵⁰ It is in Harpum's view a misconception that overreaching will take place whenever the trustees for sale make any disposition, whether *ultra vires* or not.⁹⁵¹ Contrary to Harpum's analysis, the Law Commission, prior to Harpum's time at the Law Commission, considered that an *ultra vires* disposition could overreach beneficial interests.⁹⁵² The problem with the Law Commission's argument is that it is questionable whether the Law Commission realised the full implications and

⁹⁴⁸ Graham Ferris and Graham Battersby *Overreaching and the Trusts of Land and Appointment of Trustees Act 1996- A Reply to Mr Dixon* [2001] Conv. 221 at 226.

⁹⁴⁹ Harpum *Overreaching, Trustees' Powers and the Reform of the 1925 Legislation op. cit.*, at 279ff.

⁹⁵⁰ Harpum *ibid.*, at 294.

⁹⁵¹ *Ibid.*, at 279.

⁹⁵² Law Commission Working Paper No. 106 *Trusts of Land Overreaching* (1988) paras. 1.1 and 4.6 footnote 10 relying partly on section 17 of the Trustee Act 1925 and on *Flegg*. Charles Harpum was a Law Commissioner from 1994 to 2001. This assertion was not, however, repeated in Law Com. No. 188 in 1989.

repercussions of their statement. Contrary to the view expressed by the Law Commission, *Flegg* does not decide that an *ultra vires* disposition by trustees for sale can overreach. The case was quite expressly decided on the basis that the mortgage was one which was within the powers conferred upon the trustees by section 28 of the Law of Property Act 1925.⁹⁵³

It is necessary to examine the issue whether breaches of the relevant sections are *ultra vires* or not. The view expressed here is that breaches of section 6(5), 6(6), 6(8), 7(3), 8(2) and 11(1) do not render a conveyance *ultra vires*. Only a breach of section 8(1) will have that effect, because it is only under section 8(1) that the trustees will have no powers of disposition if these have been excluded. An analogy can be drawn with the exercise of a mortgagee's powers, which have not arisen under section 101 of the Law of Property Act 1925 and would be *ultra vires*, and an exercise of mortgagee's powers, which have arisen but are not exercisable under section 103 of the 1925 Act and would be *intra vires* but a breach of trust.⁹⁵⁴

Section 6(5)

Ferris and Battersby change their mind as to the effect of a breach of section 6(5)⁹⁵⁵ and have now sensibly come to the conclusion that a breach of section 6(5) may not render a conveyance *ultra vires* for a number of reasons which may not be the right reasons.⁹⁵⁶ First, they state that the statutory words 'In exercising the powers conferred by this section' are not an entirely satisfactory form of expression, since it is surely at the stage of considering whether, and if so how, to exercise their powers that trustees are bound to 'have regard to the rights of the beneficiaries'. Their reasoning is that although a breach of section 6(5) would not be complete until after a

⁹⁵³ Nor does *Flegg* decide that section 17 of the Trustee Act 1925 can be relied upon by a purchaser to escape liability if it transpires that the sale or mortgage was *ultra vires*. It only shields him if more money were raised on the security of the mortgage than was required. Ferris and Battersby argue [2001] Conv. 221 *op. cit.*, at 222 that Harpum *Overreaching, Trustees' Powers and the Reform of the 1925 Legislation op. cit.*, at 309 was wrong to state that *Flegg* was decided *per incuriam* in failing to rely on section 18 of the Land Registration Act 1925. Their view is that *Flegg* was correct in refusing to section 18 a crucial role in the operation of overreaching.

⁹⁵⁴ See Gray and Gray *op. cit.*, p. 1427-1429 and Megarry and Wade *op. cit.*, paras. 19-057-19-059.

⁹⁵⁵ Ferris and Battersby had previously taken the view that the mandatory words of section 6(5) led them to suppose that a disposition in breach of section 6(5) was not a disposition undertaken by trustees of land 'for the purposes of exercising their functions as trustees' and was, therefore, not authorised by section 6(1): [1998] Conv. 168 *op. cit.*, at 173-175 and [2001] Conv. 221 *op. cit.*, at 223 and 225.

⁹⁵⁶ (2003) 119 L.Q.R. 94 *op. cit.*, at 101-102.

disposition had been made in disregard of the rights of the beneficiaries, compliance with section 6(5) would have to occur prior to any disposition. This reasoning is defective, because compliance must occur not only prior to the disposition, but additionally at the time of the disposition whilst trustees are exercising their powers, since this is made mandatory by section 6(5).

Secondly, they assert that section 6(5) seems to be concerned with regulating the decision-making of trustees of land and not with their authority to act. They recognise that before the passage of the 1996 Act, disregarding the rights of the beneficiaries would have left a conveyance *intra vires*. They acknowledge that there seems to be no clear legislative intention to change the law in this regard and conclude somewhat tentatively that, ‘section 6(5) may not render a conveyance *ultra vires*.’⁹⁵⁷ Such tentative wording is overly cautious and unwarranted. Instead of stating that there is no clear legislative intention to deny the authority conferred by section 6(1) to trustees acting in breach of section 6(5), they should argue more forcefully that section 6(5) does not in any circumstances deny the authority conferred by section 6(1).

Section 6(6), 6(8) and 6(9)

Ferris and Batterbsy are wrong in their reasoning of and conclusion on section 6(6) that a breach renders a conveyance *ultra vires*. Their view is that a conveyance in breach of section 6(6) is not an exercise of the powers at all, since the language of section 6(6) is mandatory: the statutory powers ‘shall not’ be used in breach of section 6(6).⁹⁵⁸ They rationalise that section 6(1) grants the authority to make any type of disposition, but section 6(6) prevents the use of that extensive authority in breach of trust, thus limiting the operation of section 6(1). Their views are erroneous, because as a matter of construction, section 6(6) cannot remove the authority conferred by section 6(1). All that section 6(6) does is to render the trustees in breach of trust. This construction does not render section 6(1) ineffective contrary to their view and is consistent with the position prior to the 1996 Act being enacted.

⁹⁵⁷ *Ibid.*, at 102.

⁹⁵⁸ *Ibid.*, at 102.

Ferris and Battersby admit that prior to the passage of the 1996 Act, section 2 of the Law of Property Act 1925 protected purchasers from being affected by the sort of misfeasance that many breaches of section 6(6) of the 1996 Act would entail.⁹⁵⁹ Yet they offer no convincing rationale for the change which results in section 6(6) of the 1996 Act drastically reducing the effective role of section 2 of the Law of Property Act 1925. First, they state that it is inconceivable that the courts would have read section 6(1) as giving trustees the right to act in ways that breached rules of law, equity or statute. This is not a cogent justification for their views, since it is not pertinent to the issue of *intra* or *ultra vires*. Secondly, they argue that there is no indication that beneficiaries' remedies against trustees are enhanced by section 6(6). This is extraneous to the issue at hand. Lastly, reading section 6(6) as restricted in its operation to the relationship between the trustees and the beneficiaries would render later provisions of the 1996 Act otiose and they refer specifically to section 16(2). Yet section 16(2) does not metamorphose a breach of section 6(6) or 6(8) into an *ultra vires* breach of trust.

The view of Ferris and Battersby is that the statutory language of section 6(8) resembles that of section 8(2) and it seems likely that the same result is intended, so that a conveyance in breach of section 6(8) will not be an exercise of the section 6(1) powers and the trustees' acts are *ultra vires*.⁹⁶⁰ This suffers from the same flawed reasoning as section 6(6), since section 6(6) and (8) do not take away with one hand what section 6(1) has given with the other. Their reasoning on section 6(9) is sound and should have been applied by them to section 6(6) and (8). They rationalise that that section 6(9) is directed at an *intra vires* use of the trustees' powers. They have no problem accepting that the words 'when exercising the powers conferred by this section' are clearly appropriate to an *intra vires* but wrongful use of those powers. It is possible that Ferris and Battersby adopt such a lenient view, because this has no bearing on section 16 of the 1996 Act.

The only consoling factor from Ferris and Battersby's arguments is that construing section 6(6) as operating only when no other provision of the 1996 Act applies,

⁹⁵⁹ *Ibid.*, at 103.

⁹⁶⁰ *Ibid.*, at 103-104.

combined with a broad construction of sections 6(5) and 6(9), results in most dispositions made in breach of trust involving *intra vires* breaches of trust, which are capable of overreaching the interests of the beneficiaries of a trust of land. This premise avoids a thorough analysis of the complications inherent from the repercussions of their theory. It is likely to be erroneous because the wording in section 6(6) does not specify ‘any other rule of law or equity’.

Ferris and Battersby’s alternative interpretation, which is the alarming one, is that section 6(5) is intended to reach only those actions of trustees of land that would otherwise not be breaches of section 6(6), so that compliance with section 6(6) must precede violation of section 6(5), which has the problematic effect of increasing the applicability and incidence of section 6(6). In their final analysis Ferris and Battersby are oversimplifying when they state that whereas a construction of sections 6(6) and 6(9) are complementary, there are great difficulties in construing sections 6(5) and 6(6) as being complementary, since sections 16(1) and 16(2) clearly distinguish between breaches of sections 6(5) and 6(6). On the basis that it is rejected that section 6(6) renders breaches of trust *ultra vires*, it is perfectly legitimate to hold the view that section 6(5) and (6) may be complementary, with the scope of section 6(6) obviously being far wider than the scope of section 6(5). It is irrelevant that section 16(1) and (2) clearly distinguish between section 6(5) and (6), since section 16 is a self-contained provision and does not preclude overlap between section 6(5) and (6) where the circumstances arise.

Section 11

The reasoning of Ferris and Battersby on section 11 is resourceful and dexterous. They argue⁹⁶¹ that a breach of section 11⁹⁶² is a breach which precludes overreaching. The reason which they give is that otherwise, the protective provisions in section 16(1), (2) and (3) would be unnecessary. In a later article they promote a different line of reasoning,⁹⁶³ that the word ‘functions’ in sections 6(1) and 11(1) are not linked, since the word ‘function’ must carry different meanings in the two sections. In section

⁹⁶¹ [2001] Conv. 221 *op. cit.*, at 225 footnote 26.

⁹⁶² They include a disposition made contrary to section 8(2) in this argument as well.

⁹⁶³ (2003) 119 L.Q.R. 94 *op. cit.*, at 106-107.

6(1) the reference to the trustees' functions cannot be a reference to their powers, since the functions must be logically prior to the powers granted. By contrast in section 11(1) the trustees' functions are largely equated with the trustees' dispositive powers. They conclude that in the absence of any policy considerations, it might be concluded that the use of mandatory words in section 11(1) suggests that an act done in breach of that statutory injunction should be considered an act that is not carried out by the trustees for the purpose of exercising their functions as trustees and therefore outside the powers granted by section 6(1) of the 1996 Act.

Their reasoning is spurious for the following reasons. First, it is dubious to assert that sections 6(1) and 11(1) are not linked. Any hairsplitting is unhelpful, since section 11(1) clearly derives from section 6(1) and relates back to it. Secondly, any breach of trust must inevitably be *intra vires*, since sensible policy considerations dictate that such a breach of trust must have the effect of overreaching equitable interests. The whole purpose of the legislation would be defeated if such a breach of trust was considered to be *ultra vires* and if a purchaser was not protected by a breach of section 11(1).⁹⁶⁴ Thirdly, their view is not consistent with the broad view taken in *Notting Hill Housing Trust v. Brackley*⁹⁶⁵ where the Court of Appeal, in examining the meaning of 'function' within section 11, did not circumscribe the definition with the reasoning advanced by Ferris and Battersby.

Ferris and Battersby's rationale

Ferris and Battersby approach the crux of the problem⁹⁶⁶ when they assert that the shift from section 28 of the Law of Property Act 1925 to section 6 of the 1996 Act, which authorises any type of transaction, means that when section 6(1) of the 1996 Act or section 8(3) of the Trustee Act 2000 applies, either *ultra vires* dispositions will no longer be possible or the expression *ultra vires* must take on a new meaning. One possible argument, which they do not accept, is that the extension of trustees' powers leaves all possible actions *intra vires*. Contrary to the view of Ferris and Battersby,

⁹⁶⁴ Compare the view of Smith *Property Law op. cit.*, at 335-336 who states that *ultra vires* would be clear if the trustees have no power to enter into the transaction (as when the trust deed excludes powers) and probably applies to cases where a necessary consent has not been obtained.

⁹⁶⁵ *Op. cit.*, para. 15.

⁹⁶⁶ (2003) 119 L.Q.R. 94 *op. cit.*, at 97.

this is the most ideologically and conceptually appropriate analysis. Ferris and Battersby, however, prefer the view⁹⁶⁷ that section 6(1) of the 1996 Act and section 8(3) of the 2000 Act do not stand alone. In their opinion subsections (5), (6) and (8) of section 6 of the 1996 Act all purport to impose limits upon trustees of land. They maintain that in the context of the present statutory scheme the term *ultra vires* takes on a new meaning: a conveyance is *ultra vires* when it is made in breach of a provision of the 1996 Act, breach of which prevents the general grant of powers by section 6(1) from applying. This argument is, however, defective, because it confuses the grant of a power with the misuse of a power.

It is then unfortunate that Ferris and Battersby proceed to perform a *volte face* and change direction without tackling the underlying issues and without answering the questions which their analysis poses, by arguing⁹⁶⁸ that the real issue is not whether a conveyance is *intra* or *ultra vires*, but whether it is a conveyance that is capable of overreaching the equitable interests under the trust.⁹⁶⁹ Ferris and Battersby are wrong that due to section 8(2), the trustees may not use their section 6(1) powers without first obtaining that consent. It is erroneous to state that a conveyance made without obtaining the requisite consent would be void in equity and incapable of overreaching equitable interests under the trust resulting in section 2 of the Law of Property Act 1925 being unable to operate in favour of a purchaser. This is to misconstrue the interrelationship between section 8(2) and section 6. Section 8(2) does not remove the authority conferred by section 6(1); it results merely in a breach of trust and section 2 will still operate in favour of a purchaser. Ferris and Battersby state⁹⁷⁰ that the Law Commission Report⁹⁷¹ lends support to this construction of section 8 which it identifies as the cause of a potential mischief which section 26 of the Land Registration Act 2002 is intended to overcome.

⁹⁶⁷ *Ibid.*, at 98.

⁹⁶⁸ *Ibid.*, at 98-99.

⁹⁶⁹ Tee *Co-ownership and trusts op. cit.*, p. 149 states that the 1996 Act was not as radical as it might have been, because although it recognised that trusts for sale were anachronistic, it did not pursue the logic to the ultimate conclusion that overreaching also needed reform.

⁹⁷⁰ (2003) 119 L.Q.R. 94 *op. cit.*, at 99 footnote 19.

⁹⁷¹ *Land Registration for the Twenty-First Century A Conveyancing Revolution* Law Com. No. 271 (2001) para. 2.15 footnote 33 and paras. 4.10 and 4.11.

Paragraph 2.15 footnote 33 of the Law Commission Report, however, states the exact opposite of what Ferris and Battersby are maintaining and it is odd that they quote this footnote to support their proposition. It states that, 'If, for example, trustees sell land without obtaining the consent of a beneficiary that is required by the trust instrument, the transfer to the buyer will be unimpeachable. However, the trustees will remain liable for their breach of trust.' Implicit within this is that overreaching will operate in such circumstances. In addition paragraphs 4.10 and 4.11 also recognise the validity of the disposition, although again not dealing explicitly with the issue of overreaching. The Law Commission in fact states, 'where the disposition is in fact unlawful, the consequences of that unlawfulness can be pursued so long as these do not call into question the validity of the disponee's title.'⁹⁷² This is further tacit support for the proposition that overreaching will still operate.

Position in registered land?

Ferris and Battersby's arguments

Ferris and Battersby state⁹⁷³ that the exclusion from registered land of section 16(1) may lead to the need for extensive and intrusive enquiries by purchasers, which would be unwelcome and inappropriate. However, the exclusion of section 16(2) and (3) and (1) in so far as it applies to breaches of section 6(5) can be explained by section 18 of the Land Registration Act 1925,⁹⁷⁴ which has now been succeeded by section 23 of the Land Registration Act 2002. It would not explain the exclusion of section 16(5) nor would it be a sufficient explanation for the exclusion of section 16(1) in so far as it applies to breaches of section 6(5).

Ferris and Battersby then proceed to undermine this argument⁹⁷⁵ by arguing that the grant of powers to trustees *qua* trustees is not dealt with by section 18 of the Land Registration Act 1925, but by what is now section 6 of the 1996 Act, which leaves no explanation for the exclusion of section 16(2) and (3) and (1) in so far as it applies to breaches of section 6(5) from applying to registered land. Ferris and Battersby state that just as the exclusion of section 16(2) from operating to protect purchasers of

⁹⁷² *Ibid.*, para. 4.11.

⁹⁷³ [1998] Conv. 168 *op. cit.*, at 187 footnote 66.

⁹⁷⁴ *Ibid.*, at 180 footnote 37.

⁹⁷⁵ *Ibid.*, at 181-183.

registered land may render them vulnerable upon a breach of section 6(6) by their vendors, so may the exclusion of section 16(1) render such purchasers vulnerable upon a breach of section 11(1) by their vendors.⁹⁷⁶ The exclusion of section 16(2) and (3)(b) from registered land makes it necessary for purchasers to make enquiries of people in actual occupation of registered land, even if the disposition is made by two trustees of land.⁹⁷⁷ It will be necessary to ensure that the disposition is within the powers of the trustees (sections 6(8) and 8) and that the disposition is not being made in breach of section 6(6).⁹⁷⁸

If Ferris and Battersby are wrong and overreaching operates whenever any capital money is paid to two trustees, then section 16(2) is only operative when one trustee conveys the land,⁹⁷⁹ which is not the situation envisaged by section 16(2). The exclusion of section 16(2) from registered land would then be necessary to preserve the authority of *Williams and Glyn's Bank Ltd v. Boland*. Ferris and Battersby comment that these difficulties are largely absent from the draft Bill contained in the Law Commission Report and the absence of any explanation for the departures from that original draft in the Bill introduced into the House of Lords leaves us with no guidance as to the intention behind these apparent anomalies.⁹⁸⁰ Ferris and Battersby regret that the dangerous divergence created in 1964 in the protection offered to purchasers of unregistered and registered land when the dangers were probably hidden from view, should have been apparent to the Parliamentary draftsman by 1996.⁹⁸¹ They lament that there was no interest group motivated by the anticipated damage to its interests that might follow from the passage of section 16.⁹⁸²

⁹⁷⁶ *Ibid.*, at 186 footnote 61.

⁹⁷⁷ Gravells *Land Law: Text and Materials op. cit.*, p. 336 highlights the effect of the disapplication of section 16 in relation to registered land if Ferris and Battersby's analysis is adopted.

⁹⁷⁸ It is the wide ambit of section 6(6) which is likely to cause most problems, since it seems to prohibit any disposition in breach of trust.

⁹⁷⁹ [1998] Conv. 168 *op. cit.*, at 186 footnote 62.

⁹⁸⁰ *Ibid.*, at 187 footnote 66.

⁹⁸¹ *Ibid.*, at 188 referring to the Law of Property (Joint Tenants) Act 1964. E.J. Cooke *Beneficial Joint Tenants and the Protection of Purchasers: An Unsolved Problem* [2004] 68 Conv. 41 suggested amendments to the Land Registration Act 2002 to resolve in relation to registered land the problem addressed by the 1964 Act in relation to unregistered land.

⁹⁸² They contrast this [1998] Conv. 168 *op. cit.*, at 188 footnote 67 with the attention given to section 9, which Kenny and Kenny *op. cit.*, p. 2 suggest was due to the potential threat posed by the original clause 9 to professional trustees.

Why Ferris and Battersby's arguments are problematic

Where Ferris and Battersby go wrong is in assuming that, because section 16(7) excludes registered land from the operation of section 16, it necessarily follows that overreaching will not occur in the scenarios in section 16(2) and (3) where registered land is concerned, so that a purchaser of registered land does not benefit from the effects of section 16(2) and (3). The whole basis of registered land is different and section 16 is seeking to protect purchasers of unregistered land. In registered land the doctrine of notice is irrelevant, so subsections phrased in the terminology of notice are necessarily inapplicable to registered land. The purpose of section 16 is to absolve the purchaser from the need to investigate whether there has been a breach of trust in various circumstances where unregistered land is concerned. Where registered land is concerned, notice of a trust does not affect a purchaser of registered land⁹⁸³ and equitable interests will have to be protected on the register by a restriction.

In registered land it is clear that a disposition effected by a registered proprietor, even a sole trustee acting wrongfully and in breach of trust, is unchallengeable as a valid dealing with the legal title. The disponee whether by way of sale or mortgage charge must take a good title at law, since a 'statutory magic' operates in favour of the transferee or chargee.⁹⁸⁴ No question was raised as to the validity as a legal transaction of the mortgage effected by a sole trustee in *Boland*. In *Knightly v. Sun Life Assurance Society Ltd*⁹⁸⁵ Nourse J. expressly rejected the argument that the mortgage was invalid. A similar approach was adopted in relation to the transfer of an estate in fee simple in *Chhokar v. Chhokar*.⁹⁸⁶ A disposition of the registered title by a bare trustee was effective at law in *Hodgson v. Marks*,⁹⁸⁷ even though the trustee was acting in breach of trust. Similarly, in cases of forgery a forged transfer to a *bona fide* purchaser was not disturbed and the victims of the forgery were compensated by payment of indemnity.⁹⁸⁸

⁹⁸³ *Peffer v. Rigg* has not survived the Land Registration Act 2002.

⁹⁸⁴ See Gray and Gray *op. cit.*, p. 917-918 who comment that this outcome reflects not only the plenary competence of the unrestricted registered proprietor under the scheme of the Land Registration Act 1925, but also a cogent public policy in favour of the protection of innocent purchasers.

⁹⁸⁵ (1981) *The Times*, 23 July and LexisNexis p. 5-6.

⁹⁸⁶ [1984] F.L.R. 313.

⁹⁸⁷ [1971] Ch. 892.

⁹⁸⁸ Compare, however, *Argyle Building Society v. Hammond* (1984) 49 P. & C.R. 148 discussed in *Norwich and Peterborough Building Society v. Steed* [1993] Ch. 116 at 123-124 and 136-138. See

The effect of section 26 of the Land Registration Act 2002

The problem of the dangerous divergence between unregistered and registered land has been addressed by modification of the law of registered land brought about by sections 26 and 52 of the Land Registration Act 2002.⁹⁸⁹ Section 26 confers on purchasers from trustees the protection denied to them by section 16 of the 1996 Act. Commentators are generally hailing the benefits of section 26 of the Land Registration Act 2002 as the solution to the furore created by Ferris and Battersby.⁹⁹⁰ Cooke comments that clause 26 is the Bill's vital opportunity to get rid of what has been called the 'Ferris and Battersby effect'.⁹⁹¹ She notes, 'Astonishingly, LC254 made no mention of the problem, but the Bill is drafted with the intention of putting the matter beyond doubt.' The Law Commission was right to ignore the views of Ferris and Battersby.

This raises the issue of whether section 26 of the 2002 is in fact so different from the provisions of the Land Registration Act 1925.⁹⁹² The 1925 Act did not contain an explicit provision which states like section 26 that, 'a person's right to exercise owner's powers is to be taken to be free from any limitation affecting the validity of the disposition'. The Law Commission considered⁹⁹³ that the correct principle was as stated by Peter Gibson L.J. in *State Bank of India v. Sood* that, 'In registered conveyancing it is fundamental that any registered proprietor can exercise all or any powers of disposition unless some entry on the register exists to curtail or remove those powers.'⁹⁹⁴ Yet the Law Commission was uncertain as to whether this was the precise effect of the 1925 Act⁹⁹⁵ due to the decision in *Hounslow London Borough*

Ruoff and Roper op. cit., R.22 para. 40-13 discussing the notorious murderer, Haigh and see R. 24 para. 46.029. (October 2003 update, R. 24, is by Robert B. Roper, Christopher West, Martin Dixon, David Fox, Stephen R. Coveney, Sarah Wheeler and Patrick Milne.)

⁹⁸⁹ See Ferris and Battersby (2003) 119 L.Q.R. 94 *op. cit.*, at 95 and 119-124. They highlight at 125 the risk of purchasers of registered land falling into the lacunae created by section 16(7) of the 1996 Act between the coming into force of the 1996 Act and the coming into force of section 26 of the Land Registration Act 2002.

⁹⁹⁰ For a detailed analysis of section 26, see Graham Ferris *Making Sense of Section 26 of the Land Registration Act 2002* in *Modern Studies in Property Law Volume 2* edited by Elizabeth Cooke (2003) ch. 6.

⁹⁹¹ Elizabeth Cooke *The Land Registration Bill 2001* [2002] Conv. 11 at 23. See also Elizabeth Cooke *The New Law of Land Registration* (2003) p. 65-68.

⁹⁹² Compare sections 20(1) and 59(6) of the Land Registration Act 1925.

⁹⁹³ Law Com. No. 271 para. 4.3. See also para. 2.15.

⁹⁹⁴ *Op. cit.*, at 284 citing *Ruoff and Roper op. cit.*, para. 32-05. See also Gray and Gray *op. cit.*, p. 916.

⁹⁹⁵ Law Com. No. 271 paras. 2.15 and 4.3.

Council v. Hare,⁹⁹⁶ which involved an *ultra vires* disposition of registered land by a charity. In *Hare* there was an attempt, albeit unsuccessful, to rectify the register against a buyer, where the disposition was one that by statute the seller had no power to make, but the register was silent as to this fact.

If, however, the position was as stated in *Sood*, then the protection provided by section 16 was in any event unnecessary in the case of registered land, because any restrictions on the rights of the trustees to deal with the land had to be entered on the register of title.⁹⁹⁷ The implication from section 94(4) of the Land Registration Act 1925, which was a new provision inserted by the 1996 Act,⁹⁹⁸ was that unless the beneficial rights were protected by the entry of a restriction, the purchaser would not be concerned with them. Whether this was the effect of the law prior to its enactment in any event, remains debateable.⁹⁹⁹

Conclusion

Despite the heading of section 16 of protection of purchasers, section 16 is less favourable to purchasers than the previous law governing purchasers of land held on trust for sale, since under that law there was nothing to invalidate the conveyance and overreaching protected a purchaser, notwithstanding knowledge that the property was being misapplied.¹⁰⁰⁰ Thus reforms to section 16 are desirable to further the protection of purchasers and comply with the broad underlying purpose of section 16. The

⁹⁹⁶ (1990) 24 H.L.R. 9. The effect of non-compliance with section 29(1) of the Charities Act 1960 was that the grant of the lease to Miss Hare was void, but she had acquired legal title by virtue of the 'statutory magic' of section 69(1) of the Land Registration Act 1925: see Knox J. at 23. Knox J. refused to rectify the register under section 82(3). See Jill Martin *Casenotes Editor's Notes* [1993] Conv. 224.

⁹⁹⁷ See Thompson *Modern Land Law op. cit.*, p. 251.

⁹⁹⁸ It was inserted by Schedule 3 paragraph 5(8)(c) of the 1996 Act. It did not appear in the Law Commission's original draft Bill and does not appear to have been discussed or even referred to in the Parliamentary debates on the Bill: see Barraclough and Matthews *op. cit.*, para. 10.5. Section 94(4) provides that, 'There shall also be entered on the register such restrictions as may be prescribed, or may be expedient, for the protection of the rights of the persons beneficially interested in the land.'

⁹⁹⁹ Hopkins *The Trusts of Land and Appointment of Trustees Act 1996 op. cit.*, at 428 questions the breadth of the provision of section 94(4). He notes that nothing provides that a purchaser of registered land is not concerned with whether the trustees have consulted the beneficiaries. Hopkins is being idealistic in stating that it therefore seems arguable that the beneficiaries' right to be consulted should be protected by entry of a restriction, even though this would be a substantive difference from unregistered land. This highlights what may be regarded as an omission or oversight in the 1996 Act in not being as comprehensive as section 26(3) of the Law of Property Act 1925, which applied to both registered and unregistered land.

¹⁰⁰⁰ See Hopkins *ibid.*, at 427.

consequences of enacting section 16(1), (2) and (3) in particular have not been thought through and embody ideologically, as well as functionally, inconsistent and unsound principles. The whole purpose of the 1996 Act was to grant wider powers to trustees and not to compensate by creating different problems in so doing.

In addition to amending section 16(1), if the reform recommended to omit section 6(6) and (8) from future legislation is adopted, then section 16(2) should be repealed. If section 6(6) and (8) remain, then section 16(2) should be amended to adopt positive wording, so that section 16(2)(a) remains the same, but (b) would state ‘(b) the purchaser of the land has actual or imputed notice of the contravention, the contravention invalidates the conveyance in equity only.’ Section 16(3) should be amended so that (a) reads ‘(a) where trustees who convey land which is subject to the trust contravene section 8(1), the conveyance will be void both at law and in equity’, and (b) reads ‘(b) where trustees who convey land which is subject to the trust contravene section 8(2), the contravention invalidates the conveyance in equity only.’ Reference in section 16(3) to trustees taking all reasonable steps to bring the limitation to the notice of any purchaser and to actual notice of the limitation can be removed due to the fact that a purchaser will have notice of breaches of section 8(1) and (2), since the limitation must be in the disposition. Such reforms would ensure that conveyancing efficiency would remain paramount.

CHAPTER 11- CONCLUSIONS

The demise of strict settlements is lamented by a small minority of solicitors who expressed strong views as to why they should be allowed to create strict settlements in the future. In terms of its conceptual place within the scheme of land law as a whole, the enactment of the trust of land, by creating a unitary method of holding land on trust, raises the question of whether it covers too many scenarios without adequately dealing with any of them. A trust to retain with a power to sell would have properly laid any legal fictions to rest. The trust of land may not be the solution which the Law Commission was hoping for. Although the reforms may superficially give the appearance of being cardinal, they are not as extensive and salient as they initially manifest themselves. Existing strict settlements were not brought within the new system; there are no facilitating provisions to enable strict settlements, especially those created accidentally, to be converted into a trust of land; existing fee tails were not converted into fees simple; the abolition of the doctrine of conversion has had little practical effect and trusts for sale are still evident as a method of landholding.

The prospective purported abolition one of the three estates of freehold, the entail, is a significant property law reform. Yet there is a window of opportunity for entails to raise their heads. For those who wish property to devolve along with a title, for those old traditional landed families who wish to stick to the old rules of descent, whose motives are patrilineal, primogenitive and patriarchal, there is a challenging opportunity to assert their rights. The purported abolition of the doctrine of conversion highlights the dichotomy between the complex roots of legal history and common usage and habitual terminology, which is a significant issue which goes to the very core of land law itself. The drafting of the provision without a full appreciation and understanding of the history of conversion leaves an undesirably drafted section open to interpretation by the judiciary as to whether and where the doctrine of conversion will rear its ominous head.

The fact that investment is confined to land within the United Kingdom is unduly restrictive, which means that settlors will have to confer express powers or that interests in foreign land will have to be acquired by acquiring shares in a company

that owns foreign land. The provisions governing the powers of trustees demonstrate a lack of a comprehensive, all-embracing policy with legislation which has been piecemeal and is unsystematic. To achieve the aim of comprehensive legislation, it would have been advantageous if the provisions of the 1996 Act had been incorporated in the Trustee Act 2000. Generally, in trying to find the best compromise between a strict settlement and a trust for sale, the Law Commission appears to juggle various advantages and disadvantages of each and arrives at what it sees as the best solution, rather than starting afresh and analysing what powers trustees and beneficiaries should have *a priori*.

The 1996 Act focuses on co-ownership and not successive interests, which are not adequately covered by the 1996 Act. The delegation provisions under section 9 are not a functional equivalent of a strict settlement, because delegation is at the trustees' discretion. It is, however, arguable that the power to delegate can be extended so that it can be mandatory for trustees to delegate to the life tenant or settlor. Alternatively, an overriding equitable power could be conferred enabling the settlor or protector to direct the trustees to delegate to the tenant for life. It may be preferable, however, in order to align more closely with a Settled Land Act tenant for life, to provide specifically under section 8(1) that the trustees have no power to dispose of the land, so that section 6(1) will not apply to this extent and that the powers of disposition are vested in the tenant for life unless he is incapacitated, in which case the powers will vest in the trustees. In fact, as has been demonstrated, in some ways the position of the tenant for life under the 1996 Act can be stronger than under the Settled Land Act.

It is unfortunate that sections 12 and 13 passed through the entire legislative process without any comment or discussion. The difficulty with sections 12 and 13 is that they are concerned with two very different situations, co-ownership and successive interests in land, and this is reflected in the drafting. Yet the right to occupy represents part of a shift in power from trustees to beneficiaries. With the abolition of conversion, this right emphasises that beneficiaries under trusts of land have rights in the land, though the right may not be sufficiently extensive, and clarification is needed that the common law has been replaced by the statutory provisions. A beneficiary who has acquired the right to occupy and to whom powers of management

have been delegated by the trustees will in some ways be in the same position as the tenant for life under a strict settlement.

Apart from the inspiration and adaptability demonstrated in *Mortgage Corporation Ltd v. Shaire*, the reasoning which appears to underlie judicial decision-making, when deciding applications under sections 14 and 15, is a conscious or sub-conscious elevation of the primacy of secured creditors, despite the specific wording of section 15(1). This approach should not, however, preclude courts on specific sets of facts from being enterprising and circumventing the restrictive pro-creditor stance adopted prior to the 1996 Act. The provisions for the protection of purchasers in section 16 do not have the effect of overruling *City of London Building Society v. Flegg* in relation to registered land and fortunately section 26 of the Land Registration Act 2002 has placed the matter beyond doubt. Breaches of sections 6(5), 6(6), 6(8) and 8(2) do not render a conveyance *ultra vires* and do not prevent the legal title passing; only a breach of section 8(1) has this effect. Since section 8(1) and (2) provide that the limitation must be in the disposition, a purchaser will inevitably have notice of the limitation, thus requiring a substantial redraft of section 16(3).

The weaknesses on meticulous examination of the statutory provisions are diverse and multifarious. What should be a straightforward enunciation of principles has become a morass of uncertainty and enigma. Clarity and comprehensibility are desirable aims and worthwhile goals which should have been achieved in drafting this legislation. Although many of the inherent difficulties may well prove to be merely academic and theoretical, some may have practical and empirical significance, which should be dealt with in a future Bill such as an Administration of Justice Bill, Law of Property Bill or Land Registration Bill, rather than be left to strained judicial interpretation.

APPENDIX 1

Questionnaire for solicitors' firms with clients with strict settlements

Strict settlements under Settled Land Act 1925

1. How many clients have you had with strict settlements under the Settled Land Act 1925 in the last 10 years?

Yourself (a) 0 (b) 1-4 (c) 5-10 (d) 10-20 (e) more than 20

Approximate number:

Firm (a) 0 (b) 1-4 (c) 5-10 (d) 10-20 (e) more than 20

Approximate number:

Have the numbers been declining?

2. Were your clients satisfied with the system of strict settlements under the Settled Land Act 1925?

(a) Yes (b) No (c) Partly

3. Please explain your answer to question 2.

4. Were you as a solicitor satisfied with the system of strict settlements under the Settled Land Act 1925?

(a) Yes (b) No (c) Partly

5. Please explain your answer to question 4.

6. Why were the strict settlements set up in which your clients are involved?

(a) as a medium for intergenerational transfer of wealth within the family

(b) as a means of protection of individual beneficiaries

(c) other purpose –please specify

7. Do you consider it an advantage of strict settlements that the legal title is in the tenant for life?

(a) Yes (b) No (c) Does not make a difference

8. Please explain your answer to question 7?

9. Do you consider that the tenant for life or statutory owner have wide enough powers?

(a) Yes (b) No

10. If the answer to question 9 is no, please explain why.

11. Do you consider that the supervisory role of trustees under strict settlements is

(a) adequate (b) inadequate.

12. Please explain your answer to question 11.

13. Was it a heavy burden with strict settlements that 2 documents were required to be executed to create it, vesting deed and trust instrument?
(a) Yes (b) No
14. Please explain your answer to question 13?
15. Will it be an advantage with the new trust of land that only one document will be needed to create it?
(a) Yes (b) No (c) Not particularly
16. Please explain your answer to question 15.
17. Are you aware of strict settlements being created inadvertently?
(a) Yes (b) No
18. Can you give some examples?
19. Were you perturbed that the Trusts of Land and Appointment of Trustees Act 1996 prevents the creation of any new strict settlements?
(a) Yes (b) No (c) Partly
20. Please explain your answer to question 19?
21. Do any of your clients want to create new strict settlements but are now unable to?
(a) Yes (b) No If yes, how many?
22. Please explain your answer to question 21.
23. Have your clients been affected by the prohibition on the creation of new entailed interests (under Schedule 1, paragraph 5)?
(a) Yes (b) No
24. Please explain your answer to question 23.
25. Have any of your clients sold part of the settled land after 1st January, 1997 and used the proceeds to buy further land?
(a) Yes (b) No
26. If the answer to question 25 is yes, is the land held subject to the original strict settlement or subject to a trust of land?
(a) Yes (b) No
27. Are any of your clients affected by section 2(5) Trusts of Land and Appointment of Trustees Act 1996 that no land held on charitable, ecclesiastical or public trusts shall be or be deemed to be settled land after the commencement of this Act, even if it was or was deemed to be a settled land before that commencement?
(a) Yes (b) No
28. Was this a desirable reform?

(a) Yes (b) No Please explain your answer.

Trusts of land under the Trusts of Land and Appointment of Trustees Act 1996

29. Do you think that having a new unitary system of a trust of land is an improvement to the law?

(a) Yes (b) No

30. Please explain your answer to question 29.

31. Is it an advantageous reform to have a power to sell and a power to retain land under the new trust of land i.e. no duty to sell?

(a) Yes (b) No

32. Please explain your answer to question 31.

33. Would you still want to create an express trust for sale which would include a duty to sell?

(a) Yes (b) No

34. Please explain your answer to question 33.

35. Do you think that the Trusts of Land and Appointment of Trustees Act 1996 should have abolished the possibility of creating an express trust for sale?

(a) Yes (b) No

36. Do your clients find a trust of land an easier concept to understand than a trust for sale?

(a) Yes (b) No (c) Have not discussed it with them

37. Please explain your answer to question 36.

38. Do you consider it a disadvantage under trusts of land that the legal title will be vested in the trustees?

(a) Yes (b) No

39. Do you consider it an advantage that trustees of a trust of land under section 6 Trusts of Land and Appointment of Trustees Act 1996 now have wider powers than previously, having now powers of an absolute owner replacing the former fragmented powers of trustees for sale?

(a) Yes (b) No

40. Do you consider it is a mistake under section 8 for a settlor to be able to exclude the wide powers granted to trustees by section 6 and 7?

(a) Yes (b) No

41. Please explain your answer to question 40.

42. Do you consider it a disadvantage that the person previously in the position of a tenant for life or statutory owner has no powers unless they are delegated to him?

(a) Yes (b) No

43. Please explain your answer to question 42.

44. Do you consider it a problem that the delegation is revocable?

(a) Yes (b) No

45. Do you consider that it will be a disincentive for trustees to delegate under section 9 now that trustees are jointly and severally liable for any act or default of the beneficiary in the exercise of any function if the trustees did not exercise reasonable care in deciding to delegate the function to the beneficiary?

(a) Yes (b) No

46. Do you think that the abolition of the doctrine of conversion is a worthwhile reform?

(a) Yes (b) No

47. Please explain your answer to question 46.

48. Do you think that it was a worthwhile reform to introduce a statutory right to occupy under section 12?

(a) Yes (b) No

49. Please explain your answer to question 48.

50. Do you have any experience of section 13 in practice: exclusion and restriction of right to occupy?

(a) Yes (b) No

51. Please explain your answer to question 50.

52. Do you have any experience of sections 14 and 15 in practice: application for a court order and matters relevant in determining applications?

(a) Yes (b) No

53. If the answer to question 52 is yes, please clarify.

54. Do you have experience of section 16: protection for purchasers?

(a) Yes (b) No

55. If the answer to question 54 is yes, please clarify.

56. Do you think that conveyancing has become simpler as a result of reforms in the Trusts of Land and Appointment of Trustees Act 1996?

(a) Yes (b) No (c) Too early to say

57. Please explain your answer to question 56.

58. Have the reforms had an appreciable effect on conveyancing costs?

(a) Yes (b) No

59. Please explain your answer to question 58.

Thank you for taking the time to read the questionnaire. Please do not be put off by the number of questions. You do not have to answer them all. I will be grateful for your help in answering any of them.

APPENDIX 2

NAMES AND ADDRESSES OF SOLICITORS INTERVIEWED

<u>Name and address of firm</u>	<u>Person interviewed</u> (including position in firm and whether personal or telephone interview)	<u>Date of interview</u>
Withers 12 Gough Square London EC4	Murray Hallam (partner- personal interview)	28 April 1999
Farrer and Co 66 Lincoln's Inn Fields London WC2	Christopher Jessel (partner- personal interview)	4 May 1999
Allen and Overy 1 New Change London EC4	Geoffrey Todd (assistant solicitor- personal interview)	11 May 1999
Currey and Co 21 Buckingham Gate London SW1	Edward Perks (partner- personal interview)	11 May 1999
Macfarlanes 10 Norwich Street London EC4	Owen Clutton (partner- personal interview)	12 May 1999
May, May and Merrimans 12 South Square Gray's Inn London WC1	Roderick Steen (partner- personal interview)	19 May 1999
Speechly Bircham 154 Fleet Street London EC4	William Hancock (assistant solicitor- personal interview)	7 June 1999
Linklaters and Alliance 1 Silk Street London EC2	Nigel Reid (partner- personal interview)	7 June 1999
Payne Hicks Beach 10 New Square Lincoln's Inn London WC2	Chris Jarman (partner) and Derek Oakley (licensed conveyancer) (personal interview)	28 June 1999
Wiggin and Co The Quadrangle Imperial Square Cheltenham Gloucestershire	Mark Payne (partner- telephone interview)	13 July 1999
Eversheds 85 Queen Victoria Street London EC4	John Glasson (consultant- telephone interview)	14 July 1999
Boodle Hatfield 6 Worcester Street Oxford	Nicholas Hassall (consultant- telephone interview)	18 August 1999

Burges Salmon Narrow Quay House Narrow Quay Bristol	Charles Wyld (partner –telephone interview)	20 August 1999
Charles Russell 8-10 New Fetter Lane London EC4	George Duncan (partner –personal interview)	13 September 1999
Herbert Smith Exchange House Primrose Street London EC2	John Wood (partner- personal interview)	8 October 1999
Official Solicitor's Office 81 Chancery Lane London WC2	William McBryde (assistant Official Solicitor- personal interview)	17 November 1999
Public Trust Office 24 Kingsway London WC2	Humphrey Mather (legal consultant- personal interview)	31 January 2000

APPENDIX 3

TRUSTS OF LAND AND APPOINTMENT OF TRUSTEES ACT 1996

(1996, C.47)

PART 1 TRUSTS OF LAND

Introductory

1. Meaning of 'trust of land'

(1) In this Act -

- (a) 'trust of land' means (subject to subsection (3)) any trust of property which consists of or includes land, and
- (b) 'trustees of land' means trustees of a trust of land.

(2) The reference in subsection (1)(a) to a trust -

- (a) is to any description of trust (whether express, implied, resulting or constructive), including a trust for sale and a bare trust, and
- (b) includes a trust created, or arising, before the commencement of this Act.

(3) The reference to land in subsection (1)(a) does not include land which (despite section 2) is settled land or which is land to which the Universities and College Estates Act 1925 applies.

Settlements and trusts for sale as trusts of land

2. Trusts in place of settlements

(1) No settlement created after the commencement of this Act is a settlement for the purposes of the Settled Land Act 1925; and no settlement shall be deemed to be made under that Act after that commencement.

(2) Subsection (1) does not apply to a settlement created on the occasion of an alteration in any interest in, or of a person becoming entitled under, a settlement which -

- (a) is in existence at the commencement of this Act, or
- (b) derives from a settlement within paragraph (a) or this paragraph.

(3) But a settlement created as mentioned in subsection (2) is not a settlement for the purposes of the Settled Land Act 1925 if provision to the effect that it is not is made in the instrument, or any of the instruments, by which it is created.

(4) Where at any time after the commencement of this Act there is in the case of any settlement which is a settlement for the purposes of the Settled Land Act 1925 no relevant property which is, or is deemed to be, subject to the settlement, the settlement permanently ceases at that time to be a settlement for the purposes of that Act.

In this subsection 'relevant property' means land and personal chattels to which section 67(1) of the Settled Land Act 1925 (heirlooms) applies.

(5) No land held on charitable, ecclesiastical or public trusts shall be or be deemed to be settled land after the commencement of this Act, even if it was or was deemed to be settled land before that commencement.

(6) Schedule 1 has effect to make provision consequential on this section (including provision to impose a trust in circumstances in which, apart from this section, there would be a settlement for the purposes of the Settled Land Act 1925 (and there would not otherwise be a trust)).

3. Abolition of doctrine of conversion

(1) Where land is held by trustees subject to a trust for sale, the land is not to be regarded as personal property; and where personal property is subject to a trust for sale in order that the trustees may acquire land, the personal property is not to be regarded as land.

(2) Subsection (1) does not apply to a trust created by a will if the testator died before the commencement of this Act.

(3) Subject to that, subsection (1) applies to a trust whether it is created, or arises, before or after that commencement.

4. Express trusts for sale as trusts of land

(1) In the case of every trust for sale of land created by a disposition there is to be implied, despite any provision to the contrary made by the disposition, a power for the trustees to postpone sale of the land; and the trustees are not liable in any way for postponing sale of the land, in the exercise of their discretion, for an indefinite period.

(2) Subsection (1) applies to a trust whether it is created, or arises, before or after the commencement of this Act.

(3) Subsection (1) does not affect any liability incurred by trustees before that commencement.

5. Implied trusts for sale as trusts of land

(1) Schedule 2 has effect in relation to statutory provisions which impose a trust for sale of land in certain circumstances so that in those circumstances there is instead a trust of the land (without a duty to sell).

(2) Section 1 of the Settled Land Act 1925 does not apply to land held on any trust arising by virtue of that Schedule (so that any such land is subject to a trust of land).

Functions of trustees of land

6. General powers of trustees

(1) For the purpose of exercising their functions as trustees, the trustees of land have in relation to the land subject to the trust all the powers of an absolute owner.

(2) Where in the case of any land subject to a trust of land each of the beneficiaries interested in the land is a person of full age and capacity who is absolutely entitled to the land, the powers conferred on the trustees by subsection (1) include the power to convey the land to the beneficiaries even though they have not required the trustees to do so; and where land is conveyed by virtue of this subsection -

- (a) the beneficiaries shall do whatever is necessary to secure that it vests in them, and
- (b) if they fail to do so the court may make an order requiring them to do so

(3) The trustees of land have power to acquire land under the power conferred by section 8 of the Trustee Act 2000.

(5) In exercising the powers conferred by this section trustees shall have regard to the rights of the beneficiaries.

(6) The powers conferred by this section shall not be exercised in contravention of, or of any order made in pursuance of, any other enactment or any rule of law or equity.

(7) The reference in subsection (6) to an order includes an order of any court or of the Charity Commissioners.

(8) Where any enactment other than this section confers on trustees authority to act subject to any restriction, limitation or condition, trustees of land may not exercise the powers conferred by this section to do any act which they are prevented from doing under the other enactment by reason of the restriction, limitation or condition.

(9) The duty of care under section 1 of the Trustee Act 2000 applies to trustees of land when exercising the powers conferred by this section.

7. Partition by trustees

(1) The trustees of land may, where beneficiaries of full age are absolutely entitled in undivided shares to land subject to the trust, partition the land, or any part of it, and provide (by way of mortgage or otherwise) for the payment of any equality money.

(2) The trustees shall give effect to any such partition by conveying the partitioned land in severalty (whether or not subject to any legal mortgage created for raising equality money), either absolutely or in trust, in accordance with the rights of those beneficiaries.

(3) Before exercising their powers under subsection (2) the trustees shall obtain the consent of each of those beneficiaries.

(4) Where a share in the land is affected by an incumbrance, the trustees may either give effect to it or provide for its discharge from the property allotted to that share as they think fit.

(5) If a share in the land is absolutely vested in a minor, subsections (1) to (4) apply as if he were of full age, except that the trustees may act on his behalf and retain land or other property representing his share in trust for him.

(6) Subsection (1) is subject to sections 21 (part-unit: interests) and 22 (part-unit: charging) of the Commonhold and Leasehold Reform Act 2002.

8. Exclusion and restriction of powers

(1) Sections 6 and 7 do not apply in the case of a trust of land created by a disposition in so far as provision to the effect that they do not apply is made by the disposition.

(2) If the disposition creating such a trust makes provision requiring any consent to be obtained to the exercise of any power conferred by section 6 or 7, the power may not be exercised without that consent.

(3) Subsection (1) does not apply in the case of charitable, ecclesiastical or public trusts.

(4) Subsections (1) and (2) have effect subject to any enactment which prohibits or restricts the effect of provision of the description mentioned in them.

9. Delegation by trustees

(1) The trustees of land may, by power of attorney, delegate to any beneficiary or beneficiaries of full age and beneficially entitled to an interest in possession in land subject to the trust any of their functions as trustees which relate to the land.

(2) Where trustees purport to delegate to a person by a power of attorney under sub-section (1) functions relating to any land and another person in good faith deals with him in relation to the land, he shall be presumed in favour of that other person to have been a person to whom the functions could be delegated unless that other person has knowledge at the time of the transaction that he was not such a person.

And it shall be conclusively presumed in favour of any purchaser whose interest depends on the validity of that transaction that that other person dealt in good faith and did not have such knowledge if that other person makes a statutory declaration to that effect before or within three months after the completion of the purchase.

(3) A power of attorney under subsection (1) shall be given by all the trustees jointly and (unless expressed to be irrevocable and to be given by way of security) may be revoked by any one or more of them; and such a power is revoked by the appointment as a trustee of a person other than those by whom it is given (though not by any of those persons dying or otherwise ceasing to be a trustee).

(4) Where a beneficiary to whom functions are delegated by a power of attorney under subsection (1) ceases to be a person beneficially entitled to an interest in possession in land subject to the trust -

- (a) if the functions are delegated to him alone, the power is revoked,
- (b) if the functions are delegated to him and to other beneficiaries to be exercised by them jointly (but not separately), the power is revoked if each of the other beneficiaries ceased to be so entitled (but otherwise functions exercisable in accordance with the power are so exercisable by the remaining beneficiary or beneficiaries) and
- (c) if the functions are delegated to him and to other beneficiaries to be exercised by them separately (or either separately or jointly), the power is revoked in so far as it relates to him.

(5) A delegation under subsection (1) may be for any period or indefinite.

(6) A power of attorney under subsection (1) cannot be an enduring power within the meaning of the Enduring Powers of Attorney Act 1985.

(7) Beneficiaries to whom functions have been delegated under subsection (1) are, in relation to the exercise of the functions, in the same position as trustees (with the same duties and liabilities); but such beneficiaries shall not be regarded as trustees for any other purposes (including in particular, the purposes of any enactment permitting the delegation of functions by trustees or imposing requirements relating to the payment of capital money).

(9) Neither this section nor the repeal by this Act of section 29 of the Law of Property Act 1925 (which is superseded by this section) affects the operation after the commencement of this Act of any delegation effected before that commencement.

9A. Duties of trustees in connection with delegation etc.

(1) The duty of care under section 1 of the Trustee Act 2000 applies to trustees of land in deciding whether to delegate any of their functions under section 9.

(2) Subsection (3) applies if the trustees of land -

- (a) delegate any of their functions under section 9, and

(b) the delegation is not irrevocable.

(3) While the delegation continues, the trustees -

- (a) must keep the delegation under review,
- (b) if circumstances make it appropriate to do so, must consider whether there is a need to exercise any power of intervention that they have, and
- (c) if they consider that there is a need to exercise such a power, must do so.

(4) 'Power of intervention' includes -

- (a) a power to give directions to the beneficiary,
- (b) a power to revoke the delegation.

(5) The duty of care under section 1 of the 2000 Act applies to trustees in carrying out any duty under subsection (3).

(6) A trustee of land is not liable for any act or default of the beneficiary, or beneficiaries, unless the trustee fails to comply with the duty of care in deciding to delegate any of the trustees' functions under section 9 or in carrying out any duty under subsection (3).

(7) Neither this section nor the repeal of section 9(8) by the Trustee Act 2000 affects the operation after the commencement of this section of any delegation effected before that commencement.

Consents and consultation

10. Consents

(1) If a disposition creating a trust of land requires the consent of more than two persons to the exercise by the trustees of any function relating to the land, the consent of any two of them to the exercise of the function is sufficient in favour of a purchaser.

(2) Subsection (1) does not apply to the exercise of a function by trustees of land held on charitable, ecclesiastical or public trusts.

(3) Where at any time a person whose consent is expressed by a disposition creating a trust of land to be required to the exercise by the trustees of any function relating to the land is not of full age -

- (a) his consent is not, in favour of a purchaser, required to the exercise of the function, but
- (b) the trustees shall obtain the consent of a parent who has parental responsibility for him (within the meaning of the Children Act 1989) or of a guardian of his.

11. Consultation with beneficiaries

(1) The trustees of land shall in the exercise of any function relating to land subject to the trust -

- (a) so far as practicable, consult the beneficiaries of full age and beneficially entitled to an interest in possession in the land, and
- (b) so far as consistent with the general interest of the trust, give effect to the wishes of those beneficiaries, or (in case of dispute) of the majority (according to the value of their combined interests).

(2) Subsection (1) does not apply -

- (a) in relation to a trust created by a disposition in so far as provision that it does not apply is made by the disposition,
- (b) in relation to a trust created or arising under a will made before the commencement of this Act, or
- (c) in relation to the exercise of the power mentioned in section 6(2).

(3) Subsection (1) does not apply to a trust created before the commencement of this Act by a disposition, or a trust created after that commencement by reference to such a trust, unless provision to the effect that it is to apply is made by a deed executed -

- (a) in a case in which the trust was created by one person and he is of full capacity, by that person, or
- (b) in a case in which the trust was created by more than one person, by such of the persons who created the trust as are alive and of full capacity.

(4) A deed executed for the purposes of subsection (3) is irrevocable.

Right of beneficiaries to occupy trust land

12. The right to occupy

(1) A beneficiary who is beneficially entitled to an interest in possession in land subject to a trust of land is entitled by reason of his interest to occupy the land at any time if at that time -

- (a) the purposes of the trust include making the land available for his occupation (or for the occupation of beneficiaries of a class of which he is a member or of beneficiaries in general), or
- (b) the land is held by the trustees so as to be so available.

(2) Subsection (1) does not confer on a beneficiary a right to occupy land if it is either unavailable or unsuitable for occupation by him.

(3) This section is subject to section 13.

13. Exclusion and restriction of right to occupy

(1) Where two or more beneficiaries are (or apart from this subsection would be) entitled under section 12 to occupy land, the trustees of land may exclude or restrict the entitlement of any one or more (but not all) of them.

(2) Trustees may not under subsection (1) -

- (a) unreasonably exclude any beneficiary's entitlement to occupy land, or
- (b) restrict any such entitlement to an unreasonable extent.

(3) The trustees of land may from time to time impose reasonable conditions on any beneficiary in relation to his occupation of land by reason of his entitlement under section 12.

(4) The matters to which trustees are to have regard in exercising the powers conferred by this section include -

- (a) the intentions of the person or persons (if any) who created the trust,
- (b) the purposes for which the land is held, and
- (c) the circumstances and wishes of each of the beneficiaries who is (or apart from any previous exercise by the trustees of those powers would be) entitled to occupy the land under section 12.

(5) The conditions which may be imposed on a beneficiary under subsection (3) include in particular, conditions requiring him -

- (a) to pay any outgoings or expenses in respect of the land, or
- (b) to assume any other obligation in relation to the land or to any activity which is or is proposed to be conducted there.

(6) Where the entitlement of any beneficiary to occupy land under section 12 has been excluded or restricted, the conditions which may be imposed on any other beneficiary under subsection (3) include, in particular, conditions requiring him to -

- (a) make payments by way of compensation to the beneficiary whose entitlement has been excluded or restricted, or
- (b) forgo any payment or other benefit to which he would otherwise be entitled under the trust so as to benefit that beneficiary.

(7) The powers conferred on trustees by this section may not be exercised -

- (a) so as prevent any person who is in occupation of land (whether or not by reason of an entitlement under section 12) from continuing to occupy the land, or
- (b) in a manner likely to result in any such person ceasing to occupy the land, unless he consents or the court has given approval.

(8) The matters to which the court is to have regard in determining whether to give approval under subsection (7) include the matters mentioned in subsection (4)(a) to (c).

Powers of court

14. Applications for order

(1) Any person who is a trustee of land or has an interest in property subject to a trust of land may make an application to the court for an order under this section.

(2) On an application for an order under this section the court may make any such order -

- (a) relating to the exercise by the trustees of any of their functions (including an order relieving them of any obligation to obtain the consent of, or to consult, any person in connection with the exercise of any of their functions), or
- (b) declaring the nature or extent of a person's interest in property subject to the trust, as the court thinks fit.

(3) The court may not under this section make any order as to the appointment or removal of trustees.

(4) The powers conferred on the court by this section are exercisable on an application whether it is made before or after the commencement of this Act.

15. Matters relevant in determining applications

(1) The matters to which the court is to have regard in determining an application for an order under section 14 include -

- (a) the intentions of the person or persons (if any) who created the trust,
- (b) the purposes for which the property subject to the trust is held,
- (c) the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home, and
- (d) the interests of any secured creditor of any beneficiary.

(2) In the case of an application relating to the exercise in relation to any land of the powers conferred on the trustees by section 13, the matters to which the court is to have regard also include the circumstances and wishes of each of the beneficiaries who is (or apart from any previous exercise by the trustees of those powers would be) entitled to occupy the land under section 12.

(3) In the case of any other application, other than one relating to the exercise of the power mentioned in section 6(2), the matters to which the court is to have regard also include the circumstances and wishes of any beneficiaries of full age and

entitled to an interest in possession in property subject to the trust or (in case of dispute) of the majority (according to the value of their combined interests).

(4) This section does not apply to an application if section 335A of the Insolvency Act 1986 (which is inserted by Schedule 3 and relates to applications by a trustee of a bankrupt) applies to it.

Purchaser protection

16. Protection of purchasers

(1) A purchaser of land which is or has been subject to a trust need not be concerned to see that any requirement imposed on the trustees by section 6(5), 7(3) or 11(1) has been complied with.

(2) Where -

- (a) trustees of land who convey land which (immediately before it is conveyed) is subject to the trust contravene section 6(6) or (8), but
- (b) the purchaser of the land from the trustees has no actual notice of the contravention,

the contravention does not invalidate the conveyance.

(3) Where the powers of trustees of land are limited by virtue of section 8 -

- (a) the trustees shall take all reasonable steps to bring the limitation to the notice of any purchaser of the land from them, but
- (b) the limitation does not invalidate any conveyance by the trustees to a purchaser who has no actual notice of the limitation.

(4) Where trustees of land convey land which (immediately before it is conveyed) is subject to the trust to persons believed by them to be beneficiaries absolutely entitled to the land under the trust and of full age and capacity -

- (a) the trustees shall execute a deed declaring that they are discharged from the trust in relation to that land, and
- (b) if they fail to do so, the court may make an order requiring them to do so.

(5) A purchaser of land to which a deed under subsection (4) relates is entitled to assume that, as from the date of the deed, the land is not subject to the trust unless he has actual notice that the trustees were mistaken in their belief that the land was conveyed to beneficiaries absolutely entitled to the land under the trust and of full age and capacity.

(6) Subsections (2) and (3) do not apply to land held on charitable, ecclesiastical or public trusts.

- (7) This section does not apply to registered land.

BIBLIOGRAPHY

- Adkinson, Richard *Cohabitee Rights* (2004) 154 N.L.J. 952
- Anderson, Stuart *The Proper Narrow Scope of Equitable Conversion in Land Law* (1984) 100 L.Q.R. 86
- Ashburner's Principles of Equity* 2nd edn by Denis Browne (London: Butterworths, 1933)
- Bailey S.J. *The Law of Property Act 1925, s. 130(2)* (1936) 6 C.L.J. 67
- Bailey, S.J. 'To A and his Issue': *The Law of Property Act, 1925, section 130(2)* (1946) 9 C.L.J. 185
- Bailey-Harris, Rebecca *Case Reports* [2001] Fam. Law 805
- Baker J.H. *An Introduction to English Legal History* 4th edn (London: Butterworths, 2002)
- Baker J.H. *The Oxford History of the Laws of England Vol. VI 1483-1558* (Oxford: Oxford University Press, 2003)
- Barlow, Anne *Rights in the family home- time for a conceptual revolution?* in *New Perspectives on Property Law, Human Rights and the Home* edited by Alastair Hudson (London: Cavendish, 2004)
- Barnsley D.G. *Co-owners' Rights to Occupy Trust Land* [1998] C.L.J. 123
- Barraclough, Hugh and Matthews, Paul *A Practitioner's Guide to the Trusts of Land and Appointment of Trustees Act 1996* (Birmingham: CLT Professional Publishing, 1996)
- Baughen, Simon *Trusts of Land and Family Practice* [1996] Fam. Law 736
- Bennion F.A.R. *Statutory Interpretation A Code* 4th edn (London: Butterworths, 2002)
- Bonfield L. *Marriage Settlements and the Rise of the Great Estates: The Demographic Aspect* in *Economic History Review* 2nd Ser. XXXII (1979)
- Briggs, Adrian *Trusts of Land and the Brussels Convention* (1994) 110 L.Q.R. 526
- Briggs, Adrian *Ordering the Sale of Bankrupt's Land in Portugal* (2000) 71 B.Y.B.I.L. 443
- Bright, Susan *Ending Tenancies by Notice to Quit: The Human Rights Challenge* (2004) 120 L.Q.R. 398
- Chappelle, Diane *Land Law* 6th edn (Harlow: Pearson, 2004)
- Charity Commission *Operational Guidance Trustee Act 2000 General Power of Investment* (OG 86 B1, 8 February 2002)
- Cheshire and Burn's Modern Law of Real Property* 15th edn by E.H. Burn (London: Butterworths, 1994)
- Cheshire and Burn's Modern Law of Real Property* 16th edn by E.H. Burn (London: Butterworths, 2000)
- Chesterman M.R. *Family Settlements on Trust: Landowners and the Rising Bourgeoisie in Law, Economy and Society 1750-1914: Essays in the History of English Law* edited by G.R. Rubin and D. Sugarman (Abingdon: Professional Books, 1984)
- Clarke, Helen *Co-ownership of land and occupation rights* [1997] Legal Action, July, 18
- Clarke P.J. *Land Law and Trusts* [2001] All E.R.Rev. para. 17.1
- Clayton, Sydney M. *Void Mortgages?* [1981] Conv. 19

- Clements L.M. *The Changing Face of Trusts: the Trusts of Land and Appointment of Trustees Act 1996* (1998) 61 M.L.R. 56
- Clements L.M. *Bringing Trusts into the Twenty-First Century* [2004] 2 Web J.C.L.I.
- Cooke, Elizabeth *Children and Real Property- Trusts, Interests and Considerations* [1998] Fam. Law 349
- Cooke, Elizabeth *The Land Registration Bill 2001* [2002] Conv. 11
- Cooke, Elizabeth *The New Law of Land Registration* (Oxford: Hart Publishing, 2003)
- Cooke E.J. *Beneficial Joint Tenants and the Protection of Purchasers: An Unsolved Problem* [2004] 68 Conv. 41
- Crane F.R. *Notes of Recent Cases* (1955) 19 Conv. 146
- Crane F.R. *Notes of Recent Cases* [1977] Conv. 207
- Cross Statutory Interpretation* 3rd edn by John Bell and Sir George Engle (London: Butterworths, 1995)
- Cullity, Maurice *Judicial Control of Trustees' Discretion* (1975) 25 U. of Toronto L.J. 99
- Davis, Martin and Hughes, David *An End of the Affair- Social Housing, Relationship Breakdown and the Human Rights Act 1998* [2004] 68 Conv. 19
- De Souza, Jeremy *Another APR Muddle* (2001) 19 T. & E.T.J. 9 and (2001) 76 P.L.J. 23
- De Souza, Jeremy *The Valuation of Undivided Shares in English Land* [2002] P.C.B. 328
- De Souza, Jeremy *Essex Lass Wins Again* (2002) 149 Taxation 537
- De Souza, Jeremy *Another Win for 'Essex' Lass* (2003) 151 Taxation 322
- De Souza, Jeremy *Joint Tenancies: When Should They be Recommended?* [2003] P.C.B. 57
- Dewar, John *Land, Law, and the Family Home in Land Law Themes and Perspectives* edited by Susan Bright and John Dewar (Oxford: Oxford University Press, 1998)
- Diamond, Aubrey *Repeal and Desuetude of Statutes* [1975] C.L.P. 107
- Dixon, Martin *Co-ownership and TLATA 1996* (1999) 27 S.L.R. 58
- Dixon, Martin *Overreaching and the Trusts of Land and Appointment of Trustees Act 1996* [2000] Conv. 267
- Dixon, Martin *Trusts of land, overreaching and estoppel* (2000) 30 S.L.R. 64
- Dixon, Martin *Trusts of land, sale and TOLATA: disputes between co-owners and third parties* (2001) 32 S.L.R. 59
- Draper, Michael *Trusts of Land and Appointment of Trustees Act 1996: section 14* (1998) 142 S.J. 1076
- Draper, Michael *Reformation or Revolution?* (1999) 21 Liverpool L.R. 97
- Edwards, Simon *Property Rights in the Family Home- Clarity at Last* [2004] Fam. Law 524
- Emmet and Farrand on Title* by Julian Farrand and Alison Clarke 19th edn (looseleaf) (London, Longman Professional, 1986 with updates)
- Encyclopaedia of Forms and Precedents, The Volume 40(2)* 5th edn Reissue by Lord Millett P.C. (London: Butterworths, 2002)
- Ferguson, Patricia *Estate Contracts, Constructive Trusts and the Land Charges Act* (1996) 112 L.Q.R. 549

- Ferris, Graham *Making Sense of Section 26 of the Land Registration Act 2002* in *Modern Studies in Property Law Volume 2* edited by Elizabeth Cooke (Oxford: Hart Publishing, 2003)
- Ferris, Graham and Battersby, Graham *The Impact of the Trusts of Land and Appointment of Trustees Act 1996 on Purchasers of Registered Land* [1998] Conv. 168
- Ferris, Graham and Battersby, Graham *Overreaching and the Trusts of Land and Appointment of Trustees Act 1996- A Reply to Mr Dixon* [2001] Conv. 221
- Ferris, Graham and Battersby, Graham *The General Principles of Overreaching and the Reforms of 1925* (2002) 118 L.Q.R. 270
- Ferris, Graham and Battersby, Graham *The General Principles of Overreaching and the Modern Legislative Reforms, 1996-2002* (2003) 119 L.Q.R. 94
- Forrest G.A. *Bull v. Bull: Another View* (1956) 19 M.L.R. 312
- Fox, Lorna *Living in a Policy State: from Trust for Sale to Trust of Land* (2000) 22 Liverpool L.R. 59
- Fox, Lorna *The Meaning of Home: A Chimerical Concept or a Legal Challenge?* (2002) 29(4) J. Law & Soc. 580
- Gardner, Simon *Equity, Estate Contracts and the Judicature Acts: Walsh v. Lonsdale Revisited* (1987) 7 O.J.L.S. 60
- Gold, Stephen *The Civil Way* (1996) 146 N.L.J. 1351
- Gravells, Nigel P. *Land Law: Text and Materials* 2nd edn (London: Sweet and Maxwell, 1999)
- Gravells, Nigel P. *Co-ownership, Severance and Purchasers- The Law of Property (Joint Tenants) Act 1964 on Trial?* [2000] Conv. 461
- Gray, Hamish R. *The Rehabilitation of the Undivided Share in Land* (1955) 18 M.L.R. 408
- Gray, John Chipman *The Rule against Perpetuities* 4th edn (Boston: Little, Brown, 1942 reprinted 2002)
- Gray, Kevin *Elements of Land Law* 2nd edn (London: Butterworths, 1993)
- Gray, Kevin and Gray, Susan Francis *Elements of Land Law* 3rd edn (London: Butterworths, 2001)
- Gray, Kevin and Gray, Susan Francis *Land Law* (Butterworths Core Text Series) 3rd edn (London: LexisNexis, 2003)
- Gunn, Malcolm *Mr Clegg's Law* (2004) 153 Taxation 183
- Habakkuk John, Sir *Marriage Settlements in the Eighteenth Century* in *Transactions of the Royal Historical Society* 4th Ser. XXXII (1950)
- Hanbury H.G. *Notes* (1933) 49 L.Q.R. 173
- Hanbury and Martin Modern Equity* 16th edn by Jill E. Martin (London: Sweet and Maxwell, 2001)
- Harpum, Charles *Overreaching, Trustees' Powers and the Reform of the 1925 Legislation* [1990] C.L.J. 277
- Harpum, Charles *The Law Commission and the Reform of Land Law* in *Land Law Themes and Perspectives* edited by Susan Bright and John Dewar (Oxford: Oxford University Press, 1998)
- Harpum, Charles *Overreaching, Trusts of Land and Proprietary Estoppel* (2000) 116 L.Q.R. 341
- Harris, Jonathan *Ordering the Sale of Land Situated Overseas* [2001] L.M.C.L.Q. 205

- Harwood, Michael *Gathering Moss- Trusts for Sale* [1996] Fam. Law 293
- Harwood, Michael *A Home for Life- the New Trusts of Land Act* [1997] Fam. Law 182
- Hayton, David *Purchasers of Registered Land* [1977] C.L.J. 227
- Hayton and Marshall *Commentary and Cases on the Law of Trusts and Equitable Remedies* 11th edn by David J. Hayton (London: Sweet and Maxwell, 2001)
- Hicks, Andrew *The Trustee Act 2000 and the modern meaning of 'investment'* (2001) 15 T.L.I. 203
- Histed, Elise Bennett *Finally Barring the Entail* (2000) 116 L.Q.R. 445
- Holdsworth William Searle, Sir *An Historical Introduction to the Land Law* (Oxford: Clarendon Press, 1927)
- Holdsworth, William Searle, Sir *A History of English Law* 3rd edn (London: Methuen: Sweet and Maxwell, 1945 reprinted 1966)
- Hopkins, Nicholas *Creditors and Collateral Purposes* (1995) 111 L.Q.R. 111
- Hopkins, Nicholas *The Trusts of Land and Appointment of Trustees Act 1996* [1996] Conv. 411
- Hopkins, Nicholas *Letters* [1997] Conv. 243
- Hudson, Alastair *Equity and Trusts* 3rd edn (London: Cavendish, 2003)
- Inglis, Alan *We are Family? The Uneasy Engagement between Gay Men, Lesbians and Family Law* [2001] Fam. Law 830
- Irvine, Lord, of Lairg *The Spirit of Magna Carta Continues to Resonate in Modern Law* (2003) 119 L.Q.R. 227
- Jarman, Chris *Q & A* (1997) 389 Tax Journal 19
- Jarman, Chris *More Qs and As* (1997) 390 Tax Journal 19
- Jones, Jackie *The Trusts of Land and Appointment of Trustees Act 1996- the case law in relation to bankruptcy so far* (2001) 23 J.S.W.F.L. 353
- Jones, Nigel and Kirby P.J. *Are trustees at risk?* (2000) 22 T.& E.L.J. 16
- Kenny, Ann *Trusteeship Without Responsibility* [1997] Conv. 372
- Kenny P.H. *Married Women Still Exist?* [1998] Conv. 2
- Kenny, Phillip and Kenny, Ann *The Trusts of Land and Appointment of Trustees Act 1996* (London: Sweet and Maxwell, 1997)
- Kessler, James *Drafting Trusts and Will Trusts A Modern Approach* 6th edn (London: Sweet and Maxwell, 2002)
- King, Lesley *Probate Law* (2001) 98(41) L.S.G. 33
- Land Registry H.M. *Practice Advice Leaflet No. 13* 2nd edn (2000)
- Langbein, John H. *Mandatory Rules in the Law of Trusts* (2004) 98 Northwestern U.L.R. 1105
- Law Commission *Trusts of Land* (1985, Law Com. Working Paper No. 94)
- Law Commission *Trusts of Land Overreaching* (1988, Law Com. Working Paper No. 106)
- Law Commission *Transfer of Land: Trusts of Land* (1989, Law Com. No. 181)
- Law Commission *Transfer of Land Overreaching: Beneficiaries in Occupation* (1989, Law Com. No. 188)
- Law Commission *Transfer of Land Risk of Damage after Contract for Sale* (1990, Law Com. No. 191)

- Law Commission *The Law of Trusts: The Rules against Perpetuities and Excessive Accumulations* (1993, Law Com. Consultation Paper No. 133)
- Law Commission *The Rules against Perpetuities and Excessive Accumulations* (1998, Law Com. No. 251)
- Law Commission *Trustees' Powers and Duties* (1999, Law Com. No. 260)
- Law Commission *Land Registration for the Twenty-First Century A Conveyancing Revolution* (2001, Law Com. No. 271)
- Legal 500, The: The Clients' Guide to UK Law Firms* 12th edn edited by John Pritchard (London: Legalease, 1999)
- Lewin on Trusts* 17th edn by John Mowbray, Lynton Tucker, Nicholas Le Poidevin and Edwin Simpson (London: Sweet and Maxwell, 2000) and First Supplement to the Seventeenth Edition (London, Sweet and Maxwell, 2003)
- Lightwood, John M. *Trusts for Sale* (1927) 3 C.L.J. 59
- Lord Chancellor's Department *Trusts of Land and Appointment of Trustees Bill (H.L.) Notes on Clauses*
- Loveland, Ian *The Impact of the Human Rights Act on Security of Tenure in Public Housing* [2004] P.L. 594
- Lupoi, Maurizio *The Development of Protected Trust Structures in Italy in Extending the Boundaries of Trusts and Similar Ring-Fenced Funds* edited by David Hayton (The Hague: Kluwer Law International, 2002)
- MacKenzie, Judith-Anne, Walker, Andrew and Walton, Peter *A Guide to the Trusts of Land and Appointment of Trustees Act 1996* (London: Old Bailey Press, 1998)
- MacLean, Mavis, Eekelaar, John, Lewis, Jane, Arthur, Sue, Finch, Stephen, Fitzgerald, Rory and Pearson, Philippa *When Cohabiting Parents Separate- Law and Expectations* [2002] Fam. Law 373
- MacMillan, Catharine *The European Court of Justice Agrees with Maitland: Trusts and the Brussels Convention* [1996] Conv. 125
- Maitland F.W. *Equity* 2nd edn (London: Cambridge University Press, 1936)
- Manchester A.H. *Modern Legal History* (London: Butterworths, 1980)
- Martin, Jill *Constructive Trusts of Registered Land* [1978] Conv. 52
- Martin, Jill *Casenotes Editor's Notes* [1993] Conv. 224
- Martyn J.G. Ross *Co-owners and Their Entitlement to Occupy their Land before and after the Trusts of Land and Appointment of Trustees Act 1996: Theoretical Doubts are Replaced by Practical Difficulties* [1997] Conv. 254
- Matthews, Paul *Protectors: two cases, twenty questions* (1995) 9 T.L.I. 108
- Matthews, Paul *If it ain't broke, don't fix it* (1996) 10 T.L.I. 97
- Matthews, Paul *Nice Try: Shame about Conversion* (1996/97) 5 P.T.P.R. 87
- Maudsley, Ronald H. *The Modern Law of Perpetuities* (London: Butterworths, 1979)
- Meagher, Gummow and Lehane's Equity Doctrines and Remedies* 4th edn by R.P. Meagher, J.D. Heydon and M.J. Leeming (Chatswood: LexisNexis Butterworths, 2002)
- Megarry R.E. *Perpetuities and the Cy-Près Doctrine* (1939) 55 L.Q.R. 422
- Megarry R.E. *'To A and his Issue': The Law of Property Act, 1925, section 130(2)* (1945) 9 C.L.J. 46
- Megarry R.E. *Tenancies by the Entireties Redivivus* (1966) 82 L.Q.R. 29
- Megarry and Wade The Law of Real Property* 5th edn by Sir Robert Megarry and H.W.R. Wade (London: Stevens and Sons, 1984)

- Megarry and Wade The Law of Real Property* 6th edn by Charles Harpum (London: Sweet and Maxwell, 2000)
- Miller, Gareth *Applications by a trustee in bankruptcy for sale of the family home* (1999) 15 I.L.P. 176
- Mitchell, Robert *Trusts for Sale in Wills- Excess Baggage?* [1999] Conv. 84
- Morris J.H.C. and Barton Leach W. *The Rule against Perpetuities* 2nd edn (London: Stevens, 1962)
- Oakley A.J. *Constructive Trusts* 3rd edn (London: Sweet and Maxwell, 1997)
- Oldham, Mika *Estate Contracts, Constructive Trusts and Estoppels in Unregistered Land* [1997] C.L.J. 32
- Oldham, Mika *Balancing Commercial and Family Interests under TLATA 1996, s. 15* [2001] C.L.J. 43
- Parliamentary Debates (Hansard): House of Lords Official Report* 5th Series (London: H.M.S.O.)
- Pascoe, Susan *The Further Decline of Overriding Interests: Bank of Baroda v. Dhillon* [1998] Conv. 415
- Pascoe, Susan *Section 15 of the Trusts of Land and Appointment of Trustees Act 1996- a Change in the Law?* [2000] Conv. 315
- Pascoe, Susan *Solicitors: Be Bold- Create Entailed Interests* [2001] Conv. 396
- Pawlowski, Mark and Greer, Sarah *Undue Influence- Back Door Tactics* [2001] Fam. Law 275
- Penny, Andrew *Rights and Powers of Trust Protectors: Rahman Revisited* [1995] 1 J.Int.P. 31
- Pettit P.H. *Conversion under a Contract for the Sale of Land* (1960) 24 Conv. 47
- Pettit P.H. *Demise of Trusts for Sale and the Doctrine of Conversion?* (1997) 113 L.Q.R. 207
- Pettit, Philip H. *Equity and the Law of Trusts* 9th edn (London: Butterworths, 2001)
- Pottage, Alain *Law Com. 181: Reforming Trusts of Land* (1989) 52 M.L.R. 683
- Pottage, Alain *Proprietary Strategies: The Legal Fabric of Aristocratic Settlements* (1998) 61 M.L.R. 162
- Price N.S. *The Enforcement of Charging Orders over the Matrimonial Home* [1997] Conv. 464
- Prichard A.M. *Express Trusts* (1973) 117 S.J. 518
- Probert, Rebecca *Creditors and section 15 of the Trusts of Land and Appointment of Trustees Act 1996: first among equals?* [2002] Conv. 61
- Probert, Rebecca *Family Law and property law: competing spheres in the regulation of the family home* in *New Perspectives on Property Law, Human Rights and the Home* edited by Alastair Hudson (London: Cavendish, 2004)
- Radley-Gardner, Oliver *Chargées and Family Property* [2001] 1 Web J.C.L.I.
- Radley-Gardner, Oliver *Section 15 of TLATA, or, The Importance of Being Earners* [2003] 5 Web J.C.L.I.
- Reed, Penelope and Wilson, Richard *The Trustee Act 2000 A Practical Guide* (Bristol: Jordan, 2001)
- Richman, Helene Pines *Using the Human Rights Act to Save the Family Home* (2000) 150 N.L.J. 1102
- Rodgers, Margaret and Davies, Anne *Trusts of Land: New Act* (1997) 94(3) L.S.G. 30

- Rogerson, Pippa *Equity, Rights in Rem and the Brussels Convention* [1994] C.L.J. 462
- Ruoff and Roper on the Law and Practice of Registered Conveyancing* 6th edn (looseleaf) by R.B. Roper, C. West, R. Fearnley, J. Donaldson, Francis Twambley (London: Sweet and Maxwell, 1991 with updates) (2003 update by Robert B. Roper, Christopher West, Martin Dixon, David Fox, Stephen R. Coveney, Sarah Wheeler and Patrick Milne.)
- Samson, John M. *Joint Ownership- Forcing a Sale* (2001) 22 P.L.B. 25
- Saunders, John B. *Words and Phrases Legally Defined* 3rd edn (London: Butterworths, 1989)
- Schuz, Rhona *Section 30 Law of Property Act 1925 and Unmarried Cohabitees* [1982] Fam. Law 108
- Sexton, Roger *The Law Commission's report on trusts of land, at last a law for contemporary society?* [1989] Trust L. & P. 66
- Sheridan L.A. and Delany V.T.H. *The Cy-Près Doctrine* (London: Sweet and Maxwell, 1959)
- Simpson A.W.B. *A History of the Land Law* 2nd edn (Oxford: Clarendon Press, 1986)
- Smith, Roger J. *Registered Land: Purchasers with Actual Notice* (1977) 93 L.Q.R. 341
- Smith, Roger *Trusts of Land Reform* [1990] Conv. 12
- Smith, Roger J. *Property Law* 4th edn (Harlow: Pearson, 2003)
- Smithers, Roger *Trust or trussed?* (2002) 146 S.J. 1079
- Snell's Equity* 30th edn by John McGhee (London: Sweet and Maxwell, 2000)
- Sparkes P. *Perpetuities Reform* (1998) 12 T.L.I. 148
- Spencer, Susan *Divide and conquer* (2004) 101(25) L.S.G. 28
- Spring, Eileen *The Settlement of Land in Nineteenth Century England in American Journal of Legal History* VIII (1964)
- Spring, Eileen *Law, Land and Family: Aristocratic Inheritance in England 1300 to 1800* (Chapel Hill, N.C.: University of North Carolina Press, 1993)
- Standard Conditions of Sale* 4th edn (Oyez, 2003)
- Stroud's Judicial Dictionary of Words and Phrases* by Daniel Greenberg and Alexandra Millbrook 6th edn (London: Sweet and Maxwell, 2000)
- Sydenham, Angela *Trusts of Land- the New Law Trusts of Land and Appointment of Trustees Act 1996* (Bristol: Jordan, 1996)
- Sydenham, Angela *Letters* [1997] Conv. 242
- Tee, Louise *Co-ownership and trusts in Land Law Issues, Debates, Policy* edited by Louise Tee (Cullompton: Willan, 2002)
- Thomas, Geraint *Thomas on Powers* (London: Sweet and Maxwell, 1998)
- Thompson M.P. *Must a Purchaser Buy a Charred Ruin* [1984] Conv. 43
- Thompson M.P. *Cohabitation, Co-ownership and Section 30* [1984] Conv. 103
- Thompson M.P. *The Widow's Plight* [1996] Conv. 295
- Thompson M.P. *Secured Creditors and Sales* [2000] Conv. 329
- Thompson M.P. *The Cumulative Range of a Mortgagee's Remedies* [2002] Conv. 53
- Thompson, M.P. *Undue Influence before Etridge* [2003] Conv. 314
- Thompson, Mark P. *Modern Land Law* 2nd edn (Oxford: Oxford University Press, 2003)
- Thornton, Saskia *Section 14- effect and interpretation* [1999] 23 P.L.J. 16

Underhill and Hayton Law Relating to Trusts and Trustees 16th edn by David J. Hayton (London: Butterworths, 2003)

Vaines P.S. *Taxing Matters* (2001) 151 N.L.J. 301

Wallington, Richard *The Trusts of Land and Appointment of Trustees Bill* (1996) 146 N.L.J. 959

Warner, Malcolm *Oke v. Rideout: orders for sale under TLATA 1996* (1999) 4 T.E.L.J. 18

Warren, Nicholas *Trustee risk and liability* (1999) 13 T.L.I. 226

Waters, Donovan *Constructive Trust- Vendor and Purchaser* (1961) 14 C.L.P. 76

Waters D.W.M. *The Nature of the Trust Beneficiary's Interest* (1967) 45 Can.B.R. 219

Watt, Gary *Escaping Section 8(1) Provisions in 'New Style' Trusts of Land* [1997] Conv. 263

Wells, Rosalyn *Sale of the Matrimonial Home- Bank of Baroda v. Dhillon* [1998] Fam. Law 208

Whitehouse C.J. *Taxation Aspects of the Right to Occupy Trust Land* (1997) 113 L.Q.R. 211

Whitehouse, Chris *Woodhall- Interest in Possession or Not* [2001] P.C.B. 132

Whitehouse, Chris and Hassall, Nicholas *Trusts of Land, Trustee Delegation and the Trustee Act 2000* 2nd edn (London: Butterworths, 2001)

Wikeley, Nick *Co-ownership of property and entitlement to means-tested benefits* (2001) 8 J.S.S.L. 95

Wikeley, Nick *The valuation of co-owners' interests in capital and means-tested benefits: half the value or the value of half?* in *New Perspectives on Property Law, Human Rights and the Home* edited by Alastair Hudson (London: Cavendish, 2004)

Williams on Wills 8th edn by C.H. Sherrin, R.F.D. Barlow, R.A. Wallington, Susannah L. Meadway, Michael Waterworth (London: Butterworths, 2002)

Wolstenholme and Cherry's Conveyancing Statutes by J.T. Farrand 13th edn (London: Oyez, 1972)